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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

SAMIRAT HAFIZ
PETITIONER

vs.

ELECTRONIC DATA SYSTEMS CORPORATION
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit Court of Appeals erred in affirming the District Court's grant of summary judgment for EDS when substantial questions of material fact were and are still in dispute?

2. Whether Hafiz should be allowed to have her case decided fairly and upon a review of correct and accurate facts.

3. Whether the judgment of the Sixth Circuit Court of Appeals should be reversed and this action remanded back to the District Court for trial.

4. Whether the Court ignored the facts and evidence Hafiz presented as to her unlawful discharge and discrimination complaint and breach of contract claim?

5. Whether the Sixth Circuit Court of Appeals erred in rendering its decision based on incorrect information presented by EDS's own supplemental appendix.

6. Can a company present falsified information to the Court and the Court accept such information and base its determination upon that information and ignore correct information submitted by the employee?

7. Whether the Sixth Circuit Court of Appeals erred in refusing to consider information presented by Hafiz in Appellant's joint appendix and in Appellant's supplemental record which Hafiz filed with the Court of Appeals with its permission to correct misinformation submitted by EDS and to add other pertinent documents.

8. Whether the Sixth Circuit Court of Appeals erred in accepting EDS' version of the facts as to Hafiz's poor work performance when Hafiz presented ample evidence to contradict EDS's allegations: specifically that her performance was highly effective and supported by documents,

letters of appreciation, awards, promotions, merit increases and nine performance appraisals and EDS presented no evidence in rebuttal.

9. Whether Hafiz has stated a prima facie case of retaliation by showing that Keith Miller attempted to discredit her employment history when he stated that her prior performance appraisals were highly rated but he didn't believe that they adequately reflected his perception of her work and then characterized her past performance as marginal in order to support EDS's decision to wrongfully terminate her and when he, himself, in fact signed one of Hafiz's past highly effective appraisals.

10. Can an employee's performance be considered "marginal" and/or defined as poor performance to support an employer's decision to terminate that employee when all of the employee's performance appraisals are either highly effective and/or rated good

and competent.

11. Whether Hafiz's performance on the X- car project can be characterized as "marginal" when EDS specifically gave her a 7.2% merit increase for her work on that project, promoted her to the X-car database project leader, gave her a letter of appreciation and a gift for her accomplishments on the project.

12. Whether the Sixth Circuit Court of Appeals completely ignored Hafiz's facts in support of her claim of retaliatory discharge which supported that the only marginal performance appraisal given to Hafiz occurred on July 31, 1986 after she filed her complaint with the Michigan Department of Civil Rights.

13. Whether the Sixth Circuit Court of Appeals erred in finding that poor performance had been presented before the filing of the civil rights complaint where there was no documented evidence to support

EDS's statement.

14. Whether the Sixth Circuit Court of Appeals overlooked the fact that the material gathered and manufactured by EDS in March of 1986 and thereafter was done in retaliation, **after** Hafiz utilized the open door policy and filed a grievance, and to ultimately support EDS's decision to terminate Hafiz.

15. Whether the Sixth Circuit Court of Appeals erred in characterizing Hafiz's documentary evidence as "various conclusory allegations" when she presented hard evidence, including but not limited to: 1) nine performance appraisals, 2) medical doctor reports including the EDS doctor's report, 3) Deposition transcripts of General Motors Managers, and 4) Correspondence to and from Roger Smith, Ken McWatters, Keith Miller and Dick Justice.

16. Whether the Sixth Circuit Court of Appeals ignored the fact that Hafiz's doctor

advised her not to return to work and that EDS' doctor did not examine Hafiz, in late November as EDS led the Court to believe, before EDS ordered her back to work.

17. Whether the Sixth Circuit Court of Appeals ignored the fact that EDS's doctor, who last examined Hafiz on November 5, 1986, stated that Hafiz's doctor would be more knowledgeable as to when and whether she is able to return to work.

18. Can a company take an employee off medical leave and force the employee back to work without a medical examination in order to support its decision to terminate that employee?

19. Whether the Sixth Circuit Court of Appeals erred in ignoring the racial and bias statements of EDS supervisor Doreen Marlow and other personnel, finding that such racial statements are not attributable to EDS management and that such statements were not made by the supervisor who made the

decision to terminate Hafiz, when in fact Hafiz was reporting to Doreen Marlow and she was providing Hafiz with direction, work assignments and was responsible for evaluating Hafiz's work?

20. Whether there was sufficient evidence to support the Court's determination that Hafiz received a copy of a stock prospectus and was put on notice that her employment was at-will when the only information presented by EDS to the Court was that the stock prospectus "generally" accompanied the stock purchase agreement, and when Hafiz stated that she did not receive a copy of the stock prospectus, she did not sign the stock prospectus and EDS failed to present any evidence that it had been received?

21. Does a company have the right to falsify an employee's personnel record and submit such record to mislead the court in ruling in its favor, as did EDS in the

instant matter?

22. Can a company separate an employee without severance pay and without any retirement benefits at age 50 in violation of the Employee Retirement Income Security Act ("ERISA") when the company didn't claimed and/or proved any misconduct against the employee and when the company's own policy provides that the employee will receive severance pay if separated under any and all circumstances except for misconduct.

23. Whether the Sixth Circuit Court of Appeals erred in accepting the negative portrayal and stigma EDS placed on Hafiz because of her national origin as a marginal employee with no initiative?

24. Whether the Sixth Circuit Court of Appeals erred in deciding the breach of contract claim and applied the wrong law to that claim, as under Michigan law, this is a question of fact for the jury to decide?

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SAMIRAT HAFIZ
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vs.

ELECTRONIC DATA SYSTEMS CORPORATION
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, SAMIRAT HAFIZ, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit affirming the United States District Court for the Eastern District of Michigan which granted summary judgment for

Respondent, Electronic Data Systems Corporation ("EDS"), in Petitioner's wrongful discharge, retaliatory discharge and discrimination case.

OPINIONS BELOW

The unpublished written opinion of the Court of Appeals is reported as docket no(s): 91,2311, 92-2293 and appears in Appendix A to this Petition. A petition for rehearing was filed with the United States Court of Appeals and the order denying the petition for rehearing appears in Appendix C. The unpublished written opinion of the District Court the Eastern District of Michigan appears in Appendix B to this Petition. A motion for reconsideration was filed with the district court and the order denying this motion appears in Appendix D.

JURISDICTION

The Court of Appeals opinion in this cause was filed on June 25, 1993. A timely petition for Rehearing was filed on July 7,

1993. The Court of Appeals denied the Petition for rehearing on October 1, 1993. This Court's jurisdiction is invoked under Title 28, U.S.C. 1254(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the United States Constitution is set forth in Appendix E.

STATEMENT OF THE CASE

Samirat Hafiz, is seeking relief from judgment and an order of the United States District Court granting Defendant's motion for summary judgment entered on October 17, 1991 and the judgment and order of the United States Court of Appeals for the Sixth Circuit affirming the district court's decision. On July 11, 1989 an original complaint was filed in the Wayne County Circuit Court for the State of Michigan. Defendant removed the case to the federal district court on the grounds of diversity of citizenship. An amended complaint was filed on May 21, 1990 stating three causes

of action: 1) Wrongful discharge based on religion and national origin discrimination; 2) Retaliatory discharge under MCLA 37.2201(a), MSA 3.548(201)(a), the Elliott-Larsen Civil Rights Act, and 3) Wrongful discharge in violation of Plaintiff's just cause employment relationship with EDS.

A motion for summary judgment was filed by EDS on April 22, 1991. A response by Samirat Hafiz's attorney was submitted on June 7, 1991. A hearing was held on October 3, 1991, and an opinion and order granting EDS' motion for summary judgment and dismissing Plaintiff's complaint in its entirety with prejudice was entered on October 17, 1991. A motion for reconsideration was filed and denied by the district court on November 27, 1991. A claim of appeal was timely filed with the District Court on November 12, 1991 and acknowledged by the Sixth Circuit of Appeals on December 6, 1991. Jurisdiction was

invoked pursuant to Title 28, U.S.C. section 1291.

The Sixth Circuit Court of Appeals affirmed the district court on June 25, 1993. Petitioner filed a timely petition for Rehearing on July 7, 1993 which was denied by the Sixth Circuit Court of Appeals on October 1, 1993. This Court's jurisdiction is invoked under Title 28, U.S.C. 1254(i).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reason that Petitioner Samirat Hafiz has been wrongfully discharge at age 50 without severance pay or retirement benefits, discriminated against, because she is an Egyptian (Arabic) Moslem, in violation of ERISA, State and Federal laws as well as the constitutions of the State of Michigan and the United States and denied her opportunity to have her case decided fairly, upon correct facts presented to the court. This

Court should also grant Certiorari for the reason that the Sixth Circuit Court of Appeals erred and departed from the accepted and usual course of judicial proceedings and/or sanctioned such a departure by the district court which granted summary judgment in favor of the Respondent EDS while there were material facts yet in dispute which should have precluded summary judgment. A denial would cause the Petitioner to be denied due process and equal treatment under the laws of the United States and the State of Michigan, and the denial of economic rights under ERISA and employment rights.

> <u>EDS presented falsified information to the lower courts and the courts ignored correct information submitted by Hafiz thus the Sixth Circuit Court of Appeals erred in rendering its decision based on incorrect information.</u>

Hafiz has diligently pursued her cause and has accumulated a momentous amount of information and facts to support her claims.

Throughout all of her court proceedings her presentation of the facts have been completely overlooked by the courts.

Hafiz presented to the lower courts evidence that 100 pages, referenced in EDS's supplemental joint appendix (pages 661-761), were taken from another deposition Hafiz gave in a totally unrelated case. These pages were submitted by EDS as parts of Hafiz's deposition in the present case. Clearly such a misrepresentation has worked against Hafiz and was ignored by both the district Court and the Court of Appeals and resulted in summary judgment being granted against her. In fact, EDS's supplemental joint appendix is full of false materials that were manufactured to support EDS's firing of Hafiz. Several of these materials were produced by EDS after Hafiz filed her complaint. For example, EDS presented during Hafiz's deposition a document entitled "Separation Sheet." The separation

sheet that Hafiz actually received with her personnel file was entitled "separation notification" and was completely different than the one submitted by EDS to the courts and identified as the "EDS Separation Form" documented as exhibit 41, R. 63.

EDS also presented, for the first time, a 15 page appraisal during Hafiz's deposition. Hafiz had never seen this document prior to her deposition, and she pointed this out to the lower courts. Yet the lower courts allowed this document to be submitted by EDS as valid evidence that Hafiz had been notified as early as March of 1986 that her performance was "marginal". Hafiz never discussed or saw this fifteen (15) page appraisal. This appraisal was also not a part of Hafiz's personnel file. Therefore, no one knows when EDS manufactured this appraisal. The appraisal that Hafiz received was only a three page appraisal (including the objectives),

documented as exhibit 24, R. 62. Hafiz received this three page appraisal on two consecutive days: July 31, 1986 and August 1, 1986, as shown and dated on the last page. This was after she had filed her civil rights complaint on July 28, 1986.

The Sixth Circuit Court of Appeals erred in affirming the District Court's grant of summary judgment.

The initial decision granting summary judgment by the United States District Court and affirmed by the Court of Appeals, was entirely inappropriate as there are **material** issues of fact which are in dispute and which should have precluded summary judgment. Summary disposition is inappropriate when there are genuine issues of material fact in dispute. Anderson v Liberty Lobby, Inc., 477 US 242, 106 S Ct 2505, 91 L Ed 2d 202 (1986); Celotex Corp v Catrett, 477 US 317, 106 S Ct 2548, 91 L Ed 2d 265 (1986). Fed.R.Civ.P. 56(c) provides that "Summary Judgment is appropriate only

if the moving party is able to show "that there is no genuine issue as to any material fact". In Celotex Corp v Catrett, 477 U.S. 317, 323; 106 S Ct 2548, at 2552-53; 91 L Ed 2d 265 (1986) this Court held that the party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a material issue of fact. The non-moving party must then go beyond the pleadings and come forward with specific facts showing that there is a genuine issue of material fact. Celotex, 477 U.S. at 324; 106 S Ct at 2553. Inferences from the facts must be viewed in the light most favorable to the non-moving party opposing the motion. Matsushita Elec. Indus. Co. v Zenith Radio Corp., 475 U.S. 574, 587 (1986) and United States v Diebold, Inc., 369 U.S. 654 (1962).

A genuine issue exists for trial when

there is a **material fact** in dispute; i.e. a fact that could potentially affect the outcome. Anderson, supra at 248. In Anderson supra, this Court's expanded analysis of materiality led it to state:

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. See generally 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure Sec. 2725, pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.
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> ****
>
> **More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party.**
>
> ****
>
> Our prior decisions may not have uniformly recited the same language

in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weight the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As Adickes, supra, and Cities Service, supra, indicate, there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Cities Service, supra, 391 U.S., at 288-289, 88 S.Ct., at 1592. If the evidence is merely colorable, Domborwski v. Eastland, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967) (per curiam), or is not significantly probative, 250 Cities Service, supra at 290, 88 S.Ct., at 1592 summary judgment may be granted.

That this is the proper focus of the inquiry is strongly suggested by the Rule itself. Rule 56(e) provided that, when a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial." And, as we noted above, Rule 56(c) provides that the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. There is not requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there

> is the need for a trial whether, in other words, there are any genuine factual issues that properly can be resolved only fa a finder of fact in favor of either party. (Footnotes omitted) Anderson at 2510 and 2511.

Hafiz submits that the lower courts' decisions were an abuse of discretion. As discussed infra, there are many material facts in the instant case yet in dispute which are germane to proper resolution of this case. These facts were presented to the lower courts but were not considered.

RELIGION AND NATIONALITY DISCRIMINATION

Hafiz established a prima facie case of religion and nationality discrimination under Title VII of the 1964 Civil Rights Act. The burden thereafter shifted to EDS to articulate a legitimate, nondiscriminatory reason for its treatment of the Hafiz. Texas Dep't of Community Affairs V Burdine, 450 U.S. 248; 101 S Ct. 1089, 67 L Ed 2d 207 (1981). EDS's stated reason for discharging her - poor performance - is merely a pretext as Hafiz

has presented documented evidence of her prior performance appraisals and successful completion of jobs and projects. In fact, Hafiz has presented an overwhelming amount of information which demonstrates that the lower courts could not have possibly reviewed this information and reached their decisions. If the lower courts were to consider those facts presented by Hafiz in the light most favorable to her, [as they are required to do as she is the non-moving party who is opposing the motion for summary judgment], it would be impossible for her case to be dismissed upon summary judgment. Clearly a major question of material fact remains - i.e., whether Petitioner's prior performance was as alleged by EDS or as presented by Hafiz and supported by her documented and highly effective performance. Hafiz has been denied due process of law and the opportunity to have a trial on a major

and material question of fact; i.e. her past work performance.

In Kraus v Sobel Corrugated Containers, Inc., 915 F. 2d 227 (6th Cir. 1990) the Sixth Circuit found that summary judgment was improperly granted where the Plaintiff, 57 years of age, was a member of the protected age group, had worked for over 17 years with the defendant, and her personnel file showed no evidence of unsatisfactory work performance.

The Kraus court stated:

> "A plaintiff may meet her burden of rebutting the defendant's articulated, reason by the use of indirect evidence, i.e., by showing that the employer's proffered explanation as unworthy of credence..."

Hafiz submits that the facts of Kraus are applicable to her case and that she has likewise shown that EDS's alleged just cause argument is simply a pretext and 'unworthy of credence'. The Kraus court further stated that evidence regarding the

Plaintiff's excellent record of performance created a genuine issue of material fact as to whether defendant's reason for the termination was pretext. Likewise in the case presented at bar, Hafiz submits that a genuine issue of material fact exists as to her excellent record of performance and EDS's allegation of poor performance.

In Jackson v University of Pittsburgh, 826 F. 2d 230 (3rd Cir. 1987) the Court held that the question of the plaintiff employee's allegedly deficient performance precluded summary judgment. The Plaintiff was a black male hired by the University of Pittsburgh and worked as an attorney in its legal department for nine years. The Plaintiff was subsequently discharged and filed a lawsuit under Title VII of the 1964 Civil Rights Act, 42 U.S.C. Sec. 2000 C-2. The district court granted summary judgment on behalf of the defendant University.

In reversing the district court, the

Third Circuit discussed the method of presumptions and shifting burdens of production as related to the required finding of "material questions," citing United States Supreme Court cases:

> In a federal discrimination case such as this one, the governing law included the "method of . . . presumptions and shifting burdens of production" set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973) ("McDonnell Douglas"), and its progeny. Dillon v. Coles, 746 F.2d 998, 1003 (3rd Cir. 1984).
>
> > First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's [dismissal]." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Community Affairs v.

Burdine. 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) ("Burdine") (quoting McDonald Douglas, 411 U.S. at 802, 93 S.Ct. at 1824); see generally Robinson v. Lehman, 771 F.2d 772, 777 n. 13 (3rd Cir. 1985); Kunda v. Muhlenberg College, 621 F.2d 532, 541-43 (3rd Cir. 1980).

This Court noted recently, in the context of a federal age discrimination claim, that a "defendant's burden of production as the moving party on summary judgment generally is to show that the plaintiff cannot meet hi [or her] burden of proof at trial." Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 895 (3rd Cir. 1987) in (banc), cert. dismissed, --- U.S. ---, 108 S. Ct. 26 (1987). This burden on the moving defendant is not satisfied, however, "merely by showing the plaintiff's inability to prove by direct evidence that the defendant's proffered reason is a pretext for . . . discrimination." Id. (original emphasis). At the summary judgment state, in other words, "all that is required [for a non-moving party to survive the motion] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve [at trial] the parties' differing version of the truth...." First Nat'l Bank of Ariz. v. Cities Servs. Co., 391 U.S. 253, 288-89, 88 S. Ct. 1575, 1592, 20 L.Ed.2d 569 (1968). Further, because:

> intent is a substantive element

> **of this cause of action-generally to be inferred from the facts and conduct of the parties--the principle is particularly at that courts should not draw factual inferences in favor of the moving party and should not resolve any genuine issues of credibility.**
>
> Ness v. Marshall, 660 F.2.d 517, 519 (3d Cir. 1981) (original emphasis).
>
> Jackson, at p. 232 & 233. [emphasis added in bold]

In the instant case Hafiz has established a prima facie case under McDonnell Douglas Corp. v Green, 411 U.S. 792, 93 S. Ct. 1017, 36 L.Ed. 2d 668 (1973) for religion and nationality discrimination. Hafiz was employed as a System Analyst/Systems Engineer and was qualified for that position. She was discharged while white non-Egyptian Moslems were retained. Jackson, supra, stated that "A plaintiff alleging discriminatory firing need only show that he [or she] was fired from a job for which he [or she] was qualified while others not in the protected class were

treated more favorable .... proof of discharge will establish a prima facie showing in a Title VII suit." Thereafter the burden then shifts to the employer to 'articulate some legitimate, nondiscriminatory reasons' for the discharge. In the Jackson case the University Defendant submitted depositions, affidavits, documents and other evidence to demonstrate that the Plaintiff's performance was poor. The Jackson Court found the sole issue was whether the Plaintiff presented "sufficient evidence to demonstrate the existence of a genuine issue" that the University's "proffered justification is merely a pretext for discrimination." Hafiz submits that the analysis of the Jackson case is applicable to her case. Like the Jackson Plaintiff, Hafiz has established a prima facie case of discrimination against EDS's claim and proffered justification of poor performance. In ruling against the

district court which granted summary judgment for the University, the Jackson Court reasoned:

> We reject the district court's conclusion. The record, including Jackson's lengthy deposition, contains more than "a scrap of evidentiary material to support h[is] argument." Alizadeh v. Safeway Stores, Inc., 802 F.2d 111, 113 (5th Cir. 1986). Instead, throughout nearly 700 transcripts pages, Jackson's deposition in numerous ways calls into question appellee's claims that Jackson was dismissed for performance deficiencies.
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> ****
>
> As a whole, such record evidence is more than sufficient to support the reasonable inference that Sullivan's criticisms of Jackson's performance are post hoc concoctions. It also suffices to support an inference that Sullivan orchestrated a campaign to get rid of Jackson because he is black. In refusing to draw such obvious inferences, and thus in entering summary judgment for appellees, it appears that the district court "invaded forbidden territory" that is reversed for a fact finder at trial. Fireman's Fund Ins. Co. v Videfreeze Corp., 540 F.2d 1171, 1178 (3rd Cir. 1976), cert. denied, 429 U.S. 1053, 97 S. Ct. 767, 50 L.Ed.2d 770 (1977).

Jackson, at p. 234. (Emphasis added)

Like the Plaintiff in Jackson, Hafiz has presented valid and hard evidence to the lower courts to support her claim that EDS's criticisms of her performance are false and are "post hoc concoctions". The issue in the instant case is not that Hafiz presented no evidence in support of her claims, rather the issue is the adequacy of the evidence. Hafiz contends that essential evidence was ignored by the lower courts. This Court has ruled that any doubt as to the existence of a genuine issue for trial must be resolved in favor of the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) and Celotex Corp. v Catrett, supra.

RETALIATORY DISCHARGE

Hafiz stated more than sufficient facts to prove a valid claim of retaliatory discharge and before a motion of summary judgment is granted, the court must be satisfied that it is impossible for

Plaintiff's claims to be supported by any evidence at trial. Vollrath v Georgia-Pacific Corp., 899 F. 2d. 533 (6th Cir. 1990) Clearly the Sixth Circuit Court of Appeals refused to apply this standard to Hafiz's case by affirming the District Court. Some of the specific facts that were ignored or overlooked by the courts concerned the issue of Hafiz's work performance. The Sixth Circuit Court of Appeals stated that "EDS has presented a valid reason for discharging her", namely poor performance. On this issue Hafiz submitted plenty of undisputed documents to show that her performance was highly successful while employed with General Motors and with EDS and that it continued to be highly successful. The lower courts simply refused to consider that this was factual information which should have defeated the granting of summary judgment. For instance, during January 1985 to April

1986 while working for EDS Hafiz was involved with the X-Car project. As a result of her highly successful performance on this project she 1) received an award of 7.2% salary increase on or about March 1985, 2) she received a promotion to full project leadership of the X-car database and 3) when the X-car was completed in April of 1986 she received a gift, an award to show EDS' appreciation, and a letter of appreciation from EDS which stated that her "contribution to the 80 X Car test information database management system is highly appreciated." Hafiz presented ample evidence in support of her nine years of excellent service. The following quotes represent actual language taken from Samirat Hafiz's past performance appraisals while working with GM. These appraisals were part of Keith Miller's review of Hafiz:

1. "Samirat is very considerate of others and has developed a good working relationship with her customers"

2. "Customer praises her thoroughness"

3. "Samirat continues to make a strong effort to understand and respond to customer needs"

4. "Excellent relationships with customers, and worked well as member of the team to modify PDP 11 systems for loads analysis"

5. "Excellent job of satisfying customers needs and communicating status back to them"

6. "She establishes good working relationships and trust with the end use, and provides good feedback to DP&A staff"

7. "Excellent job of determining customer needs and striving to meet those needs"

8. "Her interest in DP is a strong point and customers needs are always met"

9. "Effectively supported the corrosion coupon system used by both PV and DT&D and continues to be very responsive to user needs."

10. "Samirat generally develops good working relationships with customers. She handled the necessary interactions with several other groups while on the plotting projects"

11. "Samirat has developed the systems designed on both the I.E. inventory system and the DTD corrosion protection system. Excellent customer contact during design phase has led to thorough preliminary design"

12. "Documentation and post-project support are excellent"

13. "Samirat is conscientious about supplying proper documentation. Her system analysis work on projects leads to good documentation.

14. "The user instruction manual for the SRDL plotting back-up system on the VEL/ADAS computer is well done"

15. Provided strong direction to others. Her FORTRAN class was well done, good originality.

(R.62, Ex. 10 Deposition of Hafiz)

Furthermore, her highly effective performance appraisals demonstrated that she stated a claim upon which relief can be granted and met her burden of showing that a genuine issue of material fact exists as to her discrimination and retaliation claims. These facts are undisputed and were absolutely ignored by the lower courts.

These are material facts and questions for the jury to decide at trial and Hafiz has been denied the opportunity to have her case fairly decided by a jury.

The Sixth Circuit Court of Appeals incorrectly decided the retaliation issue and based its decision upon material EDS manufactured and presented which was false and incorrect. Hafiz had never received any marginal performance appraisals or complaints about her performance until after she utilized the open door policy and filed a grievance with EDS against her supervisor, Tong Pak on March 3, 1986. When Hafiz joined EDS in 1985 she had never received any negative reports or complaints regarding her work performance. It was not until after she utilized the open door policy and requested a transfer out of Mr. Tong Park's work group that she received, at a much later time, negative performance reviews. In fact, she was given a marginal

performance review only after she filed a complaint with the Michigan Department of Civil Rights on July 28, 1986. She received this alleged marginal appraisal on July 31, 1986. Clearly Hafiz's filing of a complaint with the Michigan Department of Civil Rights on July 28, 1986 falls within the purview of protected activity under the Elliott-Larsen Act. Hafiz's filing of a grievance with EDS falls within the protected sphere of the Elliott-Larsen Civil Rights Act as well. In Booker v Brown & Williamson Tobacco Co., Inc., 879 F. 2d 1304 (6th Cir. 1989) the court described the prohibited acts under MCLA Sec. 37.2701(a) the Elliott-Larsen Act:

> "The Elliott-Larsen Act prohibits discrimination or retaliation against a person "because the person has opposed a violation of this act, or because the person has made a charge, filed a Complaint, testified, assisted, or participated in an investigation, proceeding or hearing under this act"

It is also without doubt that the filing of the civil rights claim triggered

Hafiz's final termination. Furthermore her letter to GM Chairman Roger Smith, dated September 1986, was also a contributing factor in EDS's decision to terminate Hafiz. In that letter Hafiz, completely frustrated and stressed by EDS's actions in harassing her and attempting to force her out, complained to Mr. Smith of the blatant discrimination practices at EDS:

> I have been an employee of General Motors Corporation since May of 1978. I am well-educated in the area of computer science, talented, experienced, very serious about my job, and a hard worker. My computer systems that I have developed at GM Proving Grounds for Engineering Software Support are in fact evidence of my excellent accomplishments.
>
> In spite of the fact that I have received highly effective performance appraisals, which were based on users (my customers) appreciation of my work, I have been experiencing severe discrimination against me by the management only because I am a Moslem and an Arab (Egyptian).
>
> ****
>
> This continued discrimination has placed stress on me, caused me to

> become depressed, and finally led to my current illness. My doctor and the independent doctor that EDS selected to examine me (a procedure totally unprecedented in my unit) indicted that my illness is caused by my working conditions. Even with my current medical leave, Mr. Tong Pak has been calling me at home, continuing his harassment, and threatening to put me on a leave of absence.

Mr. Roger Smith's response, dated October 20, 1986, stated that the issues Hafiz raised would be not responded to unless she withdraw her complaint with the Michigan Department of Civil Rights. The lower courts completely disregarded that letter and failed to even mention that it had been reviewed.

In responding to Hafiz's retaliatory discharge claim, EDS consistently stated that she was "discharged for the marginal rating she received at least four months before she filed her complaint." This statement is absolutely not true. Hafiz presented these facts to the lower courts. Her deposition indicated that she was never

notified of a marginal appraisal. The marginal appraisal was subsequently produced after she filed a complaint against EDS. She was not aware that her performance had been rated marginal until July 31, 1986 which was after she filed the civil rights complaint. The deposition of Mr. Tong Pak, as well as his affidavit, which was submitted by Hafiz to the lower courts, affirmed that Tong Pak stated he completed her appraisal and the objective and presented them to her as a part of a performance improvement plan on or about July 31, 1986. By presenting Hafiz with an appraisal dated March 11, 1986, on July 31, 1986, obviously raises a question that material facts are in dispute. Again, it is unclear how the Court of Appeals could conclude that "the plan was a follow-up to the marginal rating that she was notified of well before and prior to July 28, 1986." There is simply no evidence that prior to

July 28, 1986 Hafiz was ever notified that her performance was marginal. That appraisal, allegedly dated March 11, 1986, did not exist in March of 1986 and was not produced until after July 28, 1986 to cover-up EDS' wrongful, retaliatory discharge motives. Clearly this information presents an issue that the proffered reason for Hafiz's discharge is pretextual and that material facts are in dispute. Once Hafiz makes out a prima facie case of retaliatory discharge the burden shifts to EDS, and EDS has consistently failed to articulate a nondiscriminatory reason for her discharge. The evidence further demonstrates that Hafiz did in fact engaged in protected activity in March of 1986; she utilized the open door policy of the company to file a complaint against her supervisor Tong Pak for unfair treatment. Under Booker v Brown & Williamson Tobacco Co., supra. Hafiz was engaged in protected activity when she

opposed the unfair treatment and wrongful discrimination in early March of 1986.

> Hafiz established a prima facie case of retaliation when she presented facts that Keith Miller changed her appraisals from highly effective to marginal after reviewing her appraisals for the past five years.

EDS' purported reason, poor performance, is patently untrue and is part of a contrived scheme to justify EDS's unlawful discriminatory activity. Hafiz requested and received an "open door" meeting with Keith Miller, Tong Pak's manager, on March 3, 1986. Keith Miller in reviewing her prior performance admitted that she had been highly rated, but stated in his report dated April 11, 1986 that he didn't believe her prior appraisals adequately reflected his perception of her performance:

> From many years of administrative experience, it is my belief that one of the worst ways to treat an employee is to give him/her an appraisal which is significantly better than the collective evaluation supports. It certainly

> appears that your appraisals during this period have given you the benefit of the doubt by avoiding the areas in which you should have striven for improvement.

Keith Miller obviously attempted to discredit Hafiz work for the past five years and attempted to change her highly effective performance ratings, despite the fact that he, himself, had signed one of Hafiz's past highly effective appraisals.

The pretext of EDS' actions is obvious by a fair review of Hafiz's actual performance appraisals, and job performance which is documented. Her record speaks for itself and demonstrates that her performance had been highly effective throughout her tenure with GM and EDS.

INTENTIONAL DISCRIMINATION AND DISPARATE TREATMENT

The lower courts concluded that Hafiz failed to establish a prima facie case of intentional discrimination in that she failed to show that the person discharging

her was predisposed to discriminate against member of her race and religion. The courts then referred to comments made by Hafiz's co-workers as "isolated references to her national origin or religion." The courts erroneously determined that the negative statements were not made by Plaintiff's immediate supervisor. Hafiz presented evidence that the negative remarks and comments came not only from co-workers but also from Plaintiff's immediate supervisor, Ms. Doreen Marlow. In April of 1986 Hafiz was instructed to report to Doreen Marlow and told that Ms. Marlow was the project leader and that Ms. Marlow would provide her with direction and work assignments. Clearly Ms. Marlow was Hafiz's superior, and her dislike of Plaintiff because of her nationality and religion was well known. Ms. Marlow's provided Tong Pak and Keith Miller with a very negative evaluation which was used by Keith Miller to support her

discharge. The disposition testimony of Mr. Thomas Caiati, an EDS supervisor and a former co-worker of Hafiz, further confirmed that Ms. Marlow had said negative things about Hafiz including that she didn't like or wasn't getting along with Hafiz because of her religion and/or nationality. Hafiz was ordered to report to Ms. Marlow while it is well known to everyone that Marlow disliked her because of her religion and nationality. It was also undisputed that EDS and GM management was at all times aware that Hafiz was Arabic and Moslem. Mr. Tong Pak reluctantly admitted during his deposition that he was aware of Plaintiff's nationality and that he discussed her religious beliefs with another EDS employee, Mr. Caiati.

Under McDonnell Douglas Corp v Green, 411 U.S. 792 (1973) the order and allocation of proof in a wrongful discharge case based upon nationality and religion is as follows:

(i) Plaintiff is a member of a protected group;

(ii) subject to an adverse employment action;

(iii) and despite her qualifications, rejected and replaced by a younger person.

See also Matras v Amoco Oil Co., 424 Mich 675 (1986)

Hafiz contends that EDS was predisposed to discriminate against persons of her nationality and religion, and that she was fired because of that predisposition. The McDonnell Douglas prima facie case formula was never intended to impose a difficult or onerous task on the plaintiff. It "does not require direct proof of discrimination." International Brotherhood of Teamsters vs US, 431 U.S. 324 (1977). A prima facie case may be established by circumstantial evidence, and Plaintiff need not show that race or gender was the exclusive cause. After a prima facie case of discrimination has been established, the burden shifts to

the defendant to articulate some legitimate, nondiscriminatory reason for its discharge of Plaintiff. EDS's alleged reason, the poor performance of Plaintiff, is highly disputed and under Michigan law a question of fact for the jury. Hafiz submits that EDS's reason for her discharge is merely a pretext and that she can show by a preponderance of the evidence that her discharge was under circumstances giving rise to an inference of unlawful discrimination.

There was also clear evidence of disparate treatment presented to the lower courts inasmuch as Plaintiff's disability income status was changed to a personal leave of absence unlike a co-worker, Lael Patterson. The Sixth Circuit Court of Appeals opinion stated:

> "Hafiz points to an employee who was treated differently while on medical leave. However, that employee was not similarly situated because that employee returned to work as soon as she was medically released while

> Hafiz want to continue on leave despite a doctor's letter advising that she was medically able to return to work"

It is unknown how the Court of Appeals made this factual finding without any hard evidence (such as a Doctor report or medical releases) and why it would rely solely upon statements' presented by EDS's counsel to sustain it findings. As a result of her constant harassment, unfair treatment and discrimination, Hafiz experienced extreme symptoms of stress. Hafiz went on medical disability leave from August 25, 1986 until December 5, 1986. Dr. Seymour Baxter, EDS' doctor who examined Hafiz, stated her condition on September 17, 1986 as follows:

> I saw Mrs. Samirat Hafiz for an independent psychiatric evaluation today at Woodland medical Center Novi, Michigan. She is a 49 year old woman who has been off of work from EDS for about four weeks. She felt she could not remain at work because of increasing symptoms of depression, manifested by nightmares with frequent awakenings and inability to concentrate, a

> decreased in interests and lack of energy. She felt that she was losing her ability to think clearly. She has lost about eight pounds in the last four weeks. She has noticed a markedly decreased appetite. She feels that much of these symptoms are made to her work condition at EDS. She described having come from General Motors to work for EDS several years ago and feeling that her work has been made more difficult from harassment from EDS supervisors."

Dr. Baxter's recommendation was then as follows:

> It is my impression that Mrs. Hafiz is indeed impaired from returning to work. She has a major affective disorder and has most of the biological signs for depression, including the sleep difficulty, impaired concentration, decreased interests, decreased energy, weight loss, decreased appetite and so on. I do feel that she should seek treatment for her illness. I do not think that she should return to work for the next month, until some progress has been made in getting her depression under control.

A report by EDS's doctor, Seymour Baxter, written on November 5, 1986 stated "I think that she should be able to return to work by December 1, 1986, by that time the medication should be at a therapeutic

level and I hope that she will be able to feel strong enough to resume her work". Hafiz was then examined by her own doctor, Reno Liegghio, on November 24, 1986 and he recommended that she remain home. Dr. Liegghio stated that he had read Dr. Baxter's report, however, he recommended that "she remain off work until her side effects have decreased and she has responded well to the medication." Dr. Liegghio further stated:

> "this is taking longer to accomplish because of her high sensitivity to this type of medication. If she returns to work at this time, I feel the progress made to this point will be jeopardized. I feel she is on the road to recovery, however, a return to work at this time would not only arrest the recovery process but I strongly feel it could well cause a relapse erasing all the recovery benefits to date. I must emphasize my concern and caution you not to force her back to work at this time and I urge you to allow her to remain in the present treatment program.

Dr. Baxter subsequently informed EDS that as Dr. Liegghio was the treating

physician, he would have better knowledge of her condition.

The Sixth Circuit Court of Appeals opinion stated that "after being notified that a unpaid personal leave of absence was available, Hafiz took a two-week unpaid personal leave of absence." This is absolutely incorrect, and contradicts the documents submitted by Hafiz to the lower courts, such as: letters to Ken McWatters, Tong Pak and Dick Justice. In these letters Hafiz specifically requested that she not be placed on a personal leave status as it would discontinue her health insurance coverage and income. She specifically stated that her salary from EDS was her only source of income and the personal leave status would interrupt her medical treatment and cause her irreparable harm.

Despite her request EDS took away her medical benefits and against her wishes placed her on personal leave status from

December 5, 1986 until December 19, 1986. She was not allowed to continue with a medical disability unlike her co-worker, Lael Patterson. The policy of EDS was to allow up to six months of medical disability income status. Hafiz was allowed less than four months despite the fact that EDS's doctor and her doctor recommended she not return to work yet. Under EDS policy, there is no guarantee that an employee on an unpaid personal leave will have a job upon return, and Hafiz returned on December 19, 1986 after being threaten with the loss of her job. She was also told that she would need a doctor's excuse if she was ever again sick for one day while the requirement of other employees was five consecutive days.

The Sixth Circuit Court of Appeals further stated that Hafiz presented no evidence to support her allegation that EDS created the TOPS project, which was designed

to fail, specifically to support their decision to discharge her. The Sixth Circuit Court of Appeals opinion stated:

> As to her other claim of retaliatory action, we hold that there is also no significant link between the protected activity and the retaliatory action. While it may be possible that the TOPS project was created by EDS specifically to fail and provide EDS with a reason to discharge her, Hafiz has presented no evidence to support that allegation.

There was plenty of undisputed evidence to support this allegation; much more than required to survive a motion for summary judgment. On the contrary, EDS presented no evidence to suggest that there might have been a legitimate, nondiscriminatory reason to explain why such a project would have been designed initially and why Hafiz was chosen to participate in the TOPS project. Moreover, Hafiz was never replaced on the project, and the project was never completed. This contradicts EDS's argument that the project was so important. It

further demonstrates that the project was assigned to Hafiz with the knowledge that it could not be completed and that it was merely a pretext of EDS to support its decision to terminate her.

Hafiz began working on the TOPS Emulation Project on or about December 19, 1986 and was given a completion date of January 9, 1987. She was given less than twenty (20) working days to complete this project as the plant was closed during the Christmas Holidays until after the New Year. The TOPS project was created specifically as a pretext in order to support EDS's decision to discharge Hafiz. A statement by Ms. Lisette Rodriquez, an employee specialist with EDS, to the Michigan Department of Civil Rights indicated that because of technical problems the time frame was extended. On or about January 12, 1987 Hafiz discovered that the project could not be completed by her or anyone else because

the subroutines (part of the software) were so inadequate that they could not be used without major changes, despite her earnest efforts. Hafiz made the changes, created new programs and ran a successful test of the programs. Despite this fact Hafiz was terminated on January 30, 1987 from employment. The Court of Appeals stated that EDS contends, and the district court agreed that Hafiz was terminated because of her poor performance on the project. This is absolutely not true as Hafiz ran a successful test of the programs.

The Sixth Circuit Court of Appeals opinion further stated that Hafiz presented no evidence of similar situated individuals who were treated differently:

> Hafiz points to several individuals she contends were similarly situated and yet were treated differently. First, she points to several employees she alleges were younger and less qualified than she, but were promoted when she was denied promotions. Hafiz gives no insight into the performance ratings or objective qualifications of the

> alleged comparable. Much less as to whether not they performed the same job for the same Supervisor.

There was clear evidence of disparate treatment towards Hafiz regarding promotions, changes in her assignments, denial of raises and overtime compensation, entry level assignments given to her outside of her field of specialization, unfair time estimates for job completions, and essentially a de facto demotion by being directed to work under employees with less qualifications and seniority. Despite Hafiz's outstanding credentials and highly effective performance she was denied promotions while other white younger, and less qualified employees were promoted, such as Ilene Komer, Doreen Marlow, and Jerry Halton, Shirley Schmidt and Jeanne Koresky.

Hafiz described her unfair and discriminatory treatment in a letter written to Keith Miller dated July 29, 1986:

"Tong Pak assigns me to do systems maintenance (entry level work) rather than systems development for which I am very well qualified.

Also, I am given assignments outside my area of expertise for which I need to learn new techniques and tools but am not permitted to receive the training necessary. Further, I am being saddled with unrealistic time completion dates for projects despite request for modification or assistance.

****

I am required to report to younger colleagues instead of working with and directing efforts of such colleagues and having project leadership responsibility. A case in point is the monthly billing program where I am required to work under Doreen Marlow who has less education, less training, and less experience than I, having been hired three years after me straight from college with a Bachelors degree in Economics. This is a reversal of roles in my opinion inasmuch as she is doing the analysis and design of the system and I am doing the coding and maintenance.

In furtherance of EDS' design to ostracize Hafiz from other EDS employees, her co-workers were instructed not to speak with Hafiz unless they were assigned to work with her. The secretary of Keith Miller, Mary

Cronin, was asked to "watch" Plaintiff. She reported to Tong Pak in a letter dated September 16, 1986 how she observed Plaintiff at Kensington Park in the early evening hours during the months of August and September 1986.

It is also undisputed that Hafiz was 50 years of age and that her discharge came one year prior to the vesting of her pension. Her annual statement indicated that she would vest as of May 30, 1988, after ten years of service. Hafiz was just short of nine years on January 30, 1987 and EDS intentionally discharged her so as to prevent her from obtaining her pension and/or benefits in violation of ERISA. EDS, shortly thereafter, changed its vesting policy from ten to five years. In addition, Hafiz received no severance pay contrary to GM's separation policy and practice of compensating all employees who have been terminated for any reason other than

misconduct. Hafiz, now age 57, is forever barred from obtaining reasonable retirement benefits from any other job because of her age.

EDS wrongfully portrayed Hafiz as a marginal employee with no initiative because of her religion and national origin.

Hafiz desires to clarify the misstatements and misrepresentation of facts cited by EDS throughout these court proceedings. EDS has falsely presented Hafiz as having no initiative and as a marginal employee. Obviously these patent untrue characterizations are designed to deny Hafiz continued employment, retirement and pension benefits and to diminish thirty (30) years of exceptional service and conscientious performance. Hafiz brought the following accomplishments with her to EDS:

1) She came to the United States in 1964 and did not know the English language.

2) With three children and while working a part time job, she was

able to pass a high school equivalency examination and receive a high school certificate in 1967.

3) In 1972 she received a B.S. degree in computer science with a GPA of over 3.1 on a scale of 4.0.

4) Based on her undergraduate accomplishments and on the recommendations of her professors, she received a teaching scholarship from memphis State University to continue graduate studies.

5) In 1974 she received a B.S. Degree with concentrations in computer science with a GPA of 3.6 on a scale of 4.0.

6) In 1974 after being in the United States for 10 years she was teaching at Wayne State University (WSU), one of the largest state universities in Michigan, as an instructor of computer science. In 1977 she received a scholarship from the University of Michigan to continue her graduate study program.

Obviously Hafiz is not a lazy person, or a person who has no initiative as falsely portrayed by EDS. In fact, while at General Motors she continued to exhibit the same diligence and industry that is so characteristic of her:

1) Hafiz joined GM in 1978 and received nine (9) highly

effective/competent appraisals throughout her employment with GM. Hafiz continued to receive raises, merit increases and to work as a team player.

2) She trained GM employees in data processing and taught computer classes on GM proving grounds for GM employees to enhance the workforce.

3) She developed large scale projects, still in production to date, that were highly appraised by GM management, specifically Ronald Osborn and William Schumacher.

4) She worked on the X-car project and was promoted to the project leadership management of the X-car database project; EDS manager Keith Miller stated that the X-car project was the most important project at EDS.

Hafiz joined EDS in 1985 and did not received any negative reports or complaints regarding her work performance <u>until after</u> she utilized the open door policy in March 3, 1986 and requested a transfer out of Mr. Tong Pak's work group. The alleged "marginal performance review" was given to Hafiz only after she filed a complaint against EDS with the Michigan Department of Civil Rights.

BREACH OF EMPLOYMENT CONTRACT AND JUST CAUSE EMPLOYMENT

In ruling against Hafiz and determining that her employment was "at-will" the Sixth Circuit Court of Appeals opined:

> To the extent that Hafiz relies on any employment agreement with EDS, that reliance also creates only an at-will agreement. Using the factors enunciated in Justice Boyle's concurrence in Rowe, there are no objective indications of intent on the part of EDS to provide just-cause employment. Any written or oral statements made by EDS would have to be viewed as merely expressions of optimistic hope of a long-term relationship. See Duncan v Rolm Mil-Spec Computers, 917 F.2d 261, 264 (6th Cir. 1990). Furthermore, there were no specific negotiations with EDS for job security.

In Toussaint v Blue Cross Blue Shield, 408 Mich 579 (1980) the Michigan Supreme Court held that "an employee may have an enforceable right not to be terminated except for just cause, grounded in either an express, oral or written contract or in legitimate expectations arising from an employer's policy statements..." Under

Michigan law the existence of a just cause contract and whether the employer's actions constituted a breach of contract is a question for the jury to decide. Mourad v Automobile Club Ins Ass'n, 186 Mich App 715 (1991) (citing Stoken v Jet Electronics & Technology, Inc., 174 Mich App 457 (1988) and Stuble v Lacks Industries, Inc., 157 Mich App 169 (1986). Where there is no clear policy and/or a mixed policy, and a practice of discharging for cause, this is a question of fact for jury. Farrell v Auto Club of Michigan, 155 Mich App 378 (1986) and Cowdrey v A & T Transport, 141 Mich App 617 (1985) and Durant v Stahlin, 375 Mich 628 1965). Where there are conflicting oral and written statements the issue must be decided by the jury as to whether there is a "just cause" contract. See, Schipani v Ford Motor Co., 102 Mich App 606 (1981).

In Rowe v Montgomery Ward, Inc., 437 Mich 627; 473 N.W. 2d 268 (1991) the

Michigan Supreme Court again addressed whether an employer's oral statements and policy statements constituted a just cause employment contract.

The Michigan Supreme Court, offering further clarification and guidance in construing oral promises, stated that such "statements of job security must be clear and unequivocal to overcome the presumption of employment at will." The Rowe plaintiff was told as long as I sold, I would have a job at Montgomery Ward". The Court found this statement, coupled with other factors, "insufficient to rise to the level of an agreement providing termination only for just cause." Notably, the fact that the plaintiff had "stumbled" into the store and had only one interview before being hired, along with the fact that there was no testimony regarding a discussion of job security, convinced the Court that there was no objective evidence that both parties had

a meeting of the minds on continued employment. In construing contractual intent, the Rowe Court stressed the importance looking at all of the facts and circumstances to evaluate the intent of the parties. In Rowe the Court evaluated not only the employer's oral statements, but the "Rules of Personal Conduct" and the disciplinary guidelines handbook which were issued to the plaintiff. It was only after a careful consideration of all of these factors the Court conclude that the plaintiff's claims were "insufficient to rise to the level of an agreement providing termination only for just cause.

In the instant case Hafiz's just cause employment agreement was based upon "more that an expression of an optimistic hope of long relationship." Hafiz was hired under two agreements: 1) a written offer of employment and 2) an oral agreement which promised that employment with General Motors

is forever as long as she did her job. Hafiz visited GM, met with its supervisors and the personnel manager and was offered a job on the spot. The personnel manager assured Hafiz that GM was a good place to work, employment was forever, job security was good and that employment benefits were the best. In the same week, Hafiz received a written employment offer in the mail. She accepted GM's offer of employment and reported to work without being asked to sign any other agreements. GM was eager to hire Hafiz (she has a B.S. and M.S. degree in computer science and was the first person with such qualifications to be hired in her group). Hafiz rejected two other offers of employment and accepted GM's offer of employment based on the oral promises of secure employment made to her. She was also the first person to be hired, in her group, with the title Systems Analyst. GM made several changes in its employment policy to

accommodate her which proved that promises were made to her. Hafiz was allowed to take time off for vacation in the first three months of her employment. GM allowed Hafiz to continue to teach college classes while working full time. The oral promises, coupled with consistent reassurances and the employer's policy statements combines to demonstrate the "meeting of the minds" and the contractual intent lacking in Rowe. Hafiz submits that her cause is unlike the plaintiff in Rowe and that the question of whether there was in fact a just cause employment agreement **must be reserved for the jury**. Rowe vs Montgomery Ward & Co., Inc. supra and Toussaint v Blue Cross Blue Shield, 409 Mich 579 (1980). Under the employment contract Hafiz could only be terminated for "just cause".

During a hearing before the Michigan Employment Security Commission (MESC) the referee, finding in favor of Hafiz stated:

> Given the state of the record, we cannot conclude that the employer has legally satisfied its burden under the law and demonstrated, by means of legally competent admissible evidence into the record, that the dismissal was for any reason rising to the level of misconduct which would be disqualifying.
>
> (see Appendix F)

EDS has not presented any evidence of just cause to support its firing of Hafiz.

While the lower courts correctly decided that Hafiz gave valuable consideration by giving up other employment opportunities in exchange for employment with EDS, the courts erred in determining that there were no objective indications of intent on the part of EDS to provide just cause employment. Hafiz maintains that the oral promises, representations and policy statements of EDS arise to more than "mere allegations" and "an expression of an optimistic hope of a long relationship." In a special edition of the EDS newsletter, EDS in Sync GM, Volume 8, Issue 5, dated October

30, 1984 Senior Vice President, Ken Riedlinger specifically refuted any contrary opinions and/or rumors that transitional GM workers would lose their GM benefits, job security and otherwise:

> "Every member of the EDS team is still a part of General Motors. EDS is 100 percent owned by GM. GM would not have entered into this alliance if it thought GM employees would be neglected in any way.

Mr. Riedlinger also stressed in a subsequent edition of In Sync (Volume 1. Issue 6, dated November 16, 1984) that the transitioned workers would not lose job security:

> I have seen several of the so called "lists" of "lost benefits." Most of these lists are flat wrong? I will be getting back with each of you shortly to again clarify that there are no "losses" of COLA, overtime, shift premium, holidays, "layoff" benefits, job security, etc.

These promises are not mere allegations, rather this is a specific and objective intent to create in the minds of the employees an expectation of job

security, the same job security they experienced with GM.

The Sixth Circuit Court of Appeals also determined that the Stock Purchase Agreement provided Hafiz with notice that employment with EDS was terminable at-will:

> The Stock Purchase Agreement prospectus adds further evidence that Hafiz's employment with EDS was terminable at-will. The prospectus states that "[n]othing herein contained... shall affect the rights of the Company to terminate any participant's employment at any time for any reason." Supp. J.A. at 153. Although Hafiz denies receiving a copy of the prospectus, by signing the stock purchase agreement, she specifically acknowledged receipt of the prospectus and agreed to abide by its terms.

EDS argued that Hafiz received a copy of stock prospectus coincident to her participation in EDS's stock incentive plan (SIP) at the time of her transition to EDS. This is in fact absolutely not true. Furthermore, the lower courts accepted EDS's version despite contrary evidence presented by Hafiz that while she received the SIP on

February 27, 1985, the stock prospectus was not attached. In fact, other GM transitioned people were also contacted and they indicated as well that no prospectus was attached to their SIP document. EDS offered no proof that the stock prospectus was actually attached to the SIP except that "it generally accompanied" the stock purchase agreement. It is inconceivable that EDS, attempting to communicate its objective intent to create an at-will employment relationship, would hide this language in the body of a stock prospectus and rely upon the belief that this information has been adequately communicated to the employees. The lower courts failed to discuss whether the manner in which EDS communicated its alleged objective intent to create an at-will employment relationship was even proper.

Moreover, as Hafiz's employment agreement was at all times with General

Motors, the stock prospectus of EDS could not alter any rights and conditions of her employment agreement. Additionally, the SIP indicated that Hafiz received 205 shares of stock. Hafiz never received 205 shares of stock. She was terminated on January 30, 1987, and had received only 44 shares.

The Sixth Circuit Court of Appeals erred in refusing to consider information presented by Hafiz in her joint appendix and in the supplemental record which she filed with the Court of Appeals permission in order to correct the record.

Hafiz filed two motions with the Court of Appeals on April 20, 1993 requesting that the Court of Appeals consider all of the information she submitted in her attempt to accurately correct the record. The Court of Appeals denied her motion to review the information on April 28, 1993. Obviously the Court of Appeals did not review nor consider the correct facts in rendering its decision. Hafiz submits that she had been denied due process of law and not given an

opportunity to have her case fully heard and fairly decided and requests this Court to grant her a writ of Certiorari to review the Court of Appeals opinion.

CONCLUSION

For the foregoing reasons petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals in this matter. If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this Court's opinions in Anderson, Celotex and Matsushita.

DATED: January 5, 1994

Respectfully submitted,

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No. 91-2311, 92-2293

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMIRAT HAFIZ, Plaintiff-Appellant,	:
v.	:
ELECTRONIC DATA SYSTEMS CORPORATION, Defendant-Appellee.	:

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: **JONES** and **BATCHELDER**, Circuit Judged; and **CELEBREZZE**, Senior Circuit Judge.

PER CURIAM. Plaintiff-Appellant Samirat Hafiz appeals the district court's grant of summary judgment for Defendant-Appellee Electronic Data Systems Corporation("EDS") in this wrongful discharge, retaliatory discharge and discriminatory discharge case.

For the reasons stated herein, we affirm.

APPENDIX A

I.

Hafiz, an Egyptian Moslem, began her employment with General Motors Corporation ("GM") in 1978 as a systems analyst/engineer in data processing. She signed an employment agreement with GM on May 30, 1978. Under the employment agreement, Hafiz was employed month-to-month on a calendar month basis. According to Hafiz, she was told by GM officials that as long as she did a good job she would never be fired and that GM never lays off its engineering staff, even in the hardest of times.

While employed at GM, Hafiz was evaluated by her supervisors several times. The overall evaluations were "good - competent" or better. Some of the individual areas of evaluation ranged from "highly effective" or "superior" to "needs improvement."

In late 1984, GM purchased EDS. GM's systems-related operations transferred from

GM to EDS. As a part of this transfer, Hafiz became employed as a systems engineer with EDS, starting on January 1, 1985. No employment agreement with EDS was signed by Hafiz because GM transitioners were not required to sign employment agreements with EDS.

Hafiz's first job assignment with EDS was in Mesa, Arizona, working on the X car. Her supervisor was Ken McWatters. While in Arizona, she received an EDS Stock Purchase Agreement which she signed and dated on February 27, 1985. A paragraph in a prospectus that generally accompanied the Stock Purchase Agreement (Hafiz has testified that she does not remember receiving a copy of the prospectus when she received the Stock Purchase Agreement) states "[n]othing herein contained . . . shall affect the rights of the Company to terminate any participant's employment at

any time for any reason." Supp. J.A.at 153.

Hafiz worked on the X car project in Arizona until July 16, 1985. On July 16, 1985, Hafiz returned to Michigan where she continued to work on the project until March 1986. While in Michigan, her group supervisor was Tong Pak. In early March 1986, Hafiz was called into Pak's office to discuss Hafiz's next project. As a result of this meeting, Pak told Hafiz that she needed to look for other job opportunities within EDS.

Disturbed by Pak's statement that she needed to look elsewhere for a job, Hafiz requested and received an "open door"[1] meeting with Keith Miller, Pak's manager. At this meeting, Hafiz indicated that she

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[1]The EDS open door meeting "provides the opportunity for any team member to talk to any leader she feels is appropriate or necessary to resolve any problem or implement an idea." Supp. J.A. at 307 (Affidavit of Keith Miller).

felt as though she and Pak could not work together and that she was being harassed by management. This meeting concluded with Miller deciding that he would seek feedback from other supervisors and users on Hafiz's performance during the preceding five years. Hafiz supplied a list of names from which Miller could solicit comments. Miller supplemented the list and contacted twenty individuals.

On March 11, 1986, Miller approved Pak's performance appraisal of Hafiz. Pak rated her marginal, the lowest EDS rating possible. On April 1, 1986, Pak met with Hafiz to discuss the appraisal; however, the full report was not discussed with her until July. On April 11, 1986, Miller completed his survey of Hafiz's past performance. His compilations--some favorable, some not favorable--were shared with Hafiz soon thereafter. On July 11, 1986, Hafiz and Pak

met again for a discussion of her annual performance appraisal which was done by him.

On July 28, 1986, Hafiz filed a complaint with the Michigan Department of Civil Rights. On July 31 or August 1, 1986, the appraisal and a performance improvement plan were given to her. The performance improvement plan is a mechanism used at EDS to attempt to bring substandard performance to an acceptable level. In addition, her supervisor was notified that she filed a complaint around that same time period.

After a vacation and attendance at a training session in August, Hafiz requested and received, starting in late August 1986, medical leave for a stress-related disability.

In late November 1986, Hafiz was notified, according to EDS practices for a stress-related disability, to report to an EDS doctor for evaluation regarding her

ability to return to work. Hafiz had not previously supplied a return dated to EDS. On December 1, 1986, a doctor evaluated Hafiz as being able to return to work. Once an employee is evaluated as able to return to work, his/her eligibility for medical leave is suspended. An employee can take uncompensated personal leave when no longer eligible for medical leave. Hafiz was notified that her medical leave would be terminated as of December 5, 1986.

On December 5, 1986, Hafiz returned to her place of employment and met with Pak and McWatters (McWatters replaced Miller as manager sometime in September 1986). After being notified that unpaid personal leave of absence was available, Hafiz took a two-week unpaid personal leave of absence. Her official return to work date was December 19, 1986. At that time, she met with Pak and McWatters. She was informed that she

was still under the performance improvement plan of July/August 1986. She was also informed that she was required to provide a doctor's excuse for any sick day taken.

Hafiz was assigned the TOPS project, which she worked on from December 19, 1986 to her termination in January 1987. According to Hafiz, this project, riddled with problems, was designed to fail and give EDS an excuse to discharge her. On January 31, 1987, Hafiz was notified of her termination because she had not made progress on the performance improvement plan.

Hafiz originally filed a complaint in the Wayne County Michigan Circuit Court on July 11, 1989. EDS removed the case to the United States District Court for the Eastern District of Michigan on the basis of diversity of citizenship. A second amended complaint, filed on May 21, 1990, stated the

following claims: 1) wrongful termination contrary to the policies, practices, and procedures of EDS which implied "just-cause" rather than "at-will" employment; 2) retaliatory discharge for filing a complaint with the Michigan Department of Civil rights, in violation of Section 701 of the Elliott-Larsen Civil Rights Act, Mich. Com. Laws Ann. Section 37.2701(a) (West 1985); and 3) discriminatory discharge based on religion and national origin, in violation of Section 202 of the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Ann. Section 37.2202(1)(a) (West 1985 & Supp. 1993),

After discovery, EDS moved for summary judgment. On October 17, 1991, the district court granted EDS's motion for summary judgment on all of Hafiz's claims.

II.

This Court's review of a grant of summary judgment is de novo; it uses the

same test that was used by the district court. See Brooks v. American Broadcasting Cos., 932 F.2d 495, 500 (6th Cir. 1991). Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See also Canderm Pharmacal, Ltd. v. Elder Pharmaceutical, Inc., 862 F.2d 597, 601 (6th Cir. 1988). "'[I]nferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" Brooks, 932 F2.d at 500 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,587 (1968) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per Curiam))).

III.

Hafiz first claims that EDS breached its employment agreement with her by discharging her without cause. Hafiz argues that there is a genuine issue of material fact regarding whether her employment with GM and EDS was "just-cause" employment, meaning that she could not be fired without cause. To support her contention that she could not only be fired for cause, Hafiz points to EDS and GM statements, policies, and practices including

> 1) statements made to her at the time she was hired about job security at GM; 2) statements contained in the GM handbook which contained promises of job security; 3) statements made by EDS that it would honor GM policies; and 4) reliance on the practice of both EDS and GM that persons did not get fired, even when they made errors - instead they were transferred, demoted, but never discharged.

Appellant's Br. at 32. In addition, Hafiz

points to a special edition of the EDS newsletter in which Ken Riedlinger, Senior Vice President of EDS, stated that transitional GM workers would not lose their GM benefits or job security when they transitioned form GM to EDS.

EDS contends, and the district court agreed, that Hafiz's employment was terminable at-will. EDS argues that Hafiz has made allegations which do not demonstrate that there was a mutually assented to just-cause employment relationship. In addition, EDS points to the prospectus to the Stock Purchase Agreement which indicated that EDS had the right to terminate Hafiz's employment at any time for any reason.

The Michigan Supreme Court has recognized that month-to-month employment is "essentially" an at-will relationship. Ferrett v. General Motors Corp., 475 N.W.2d

243, 248 (Mich. 1991). Furthermore, under Michigan law, "contracts for permanent employment are for an indefinite period of time and are presumptively construed to provide employment at will." Rowe v. Montgomery Ward & Co., 472 M.W.2d 268, 271 (Mich. 1991). "When contact claims rest on proofs or oral representations, the presumption provides assurance that oral contracts for an indefinite term, which fall outside the statute of frauds, will be recognized only where circumstances suggest both parties intended to be bound." Id. An exception to the at-will presumption exists when there is an expressed agreement to terminate only for cause or when an employee has a legitimate expectation of just-cause contract. Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W. 2d 880, 885, 890 (Mich. 1980).

"In deciding whether there was mutual

assent to a just-cause provision, [Michigan courts] use an objective test, 'looking to the expressed words of the parties and their visible acts.'" Rowe, 473 N.W.2d at 273 (emphasis in original) (citations omitted). A footnote in a concurring opinion in Rowe suggests factors to be considered:

> Among the circumstances identified as objective indications of intent are the clarity, specificity, and lack of ambiguity or oral statements; whether there were specific negotiations for job security; the nature of the position; and whether, if policy statements are relied on, they support or undercut a reasonable belief that a promise of job security was being extended.

Id. at 283 n.4 (Boyle, J., concurring).

To the extent that Hafiz relies on any employment agreement with GM to show that she could be terminated only for just-cause, the employment agreement with GM established an at-will employment. The agreement that she signed in 1978 stated, "The Employee

acknowledged that his employment under this agreement is from month to month only on a calendar month basis." Supp. J.A. at 160 Furthermore, the agreement provided:

> The Employer and the Employee acknowledge that there are no other arrangements, agreements, or understandings, verbal or in writing, regarding same and that any modification or amendment hereof, other than a cancellation and replacement hereof by another written form of agreement, must be endorsed hereon in writing and initialed by both the Employee and the Employer.

Id.

As this Court recently stated in an unpublished opinion involving a person who worked for GM before being transitioned to EDS, "[o]nce [the plaintiff] signed the agreement acknowledging that his employment was month-to-month, [the plaintiff] could entertain no legitimate expectation of never being discharged without just-cause. By its own terms, the Employment Agreement could

only be modified by a new agreement signed by both parties." White v. Electronic Data Sys. Corp., No. 91-2379 (6th Cir. Aug. 28, 1992) WL, CTA6) (citations omitted). See also Taylor v. General Motors Corp., 826 F.2d 452, 457-58 (6th Cir. 1987).

To the extent that Hafiz relies on any employment agreement with EDS, that reliance also creates only an at-will agreement. Using the factors enunciated in Justice Boyle's concurrence in Rowe, there are no objective indications of intend on the part of EDS to provide just-cause employment. Any written or oral statements made by EDS would have to be viewed as merely expressions of optimistic hope of a long-term relationship. See Duncan v. Rolm Mil-Spec Computers, 917 F.2d 261, 264 (6th Cir. 1990). Furthermore, there were no specific negotiations with EDS for job security. Cf. Rowe, 473 N.W.2d at 274-75.

The Stock Purchase Agreement prospectus adds further evidence that Hafiz's employment with EDS was terminable at-will. The prospectus states that "[n]othing herein contained . . . shall affect the rights of the Company to terminate any participant's employment at any time for any reason." Supp. J.A. at 153. Although Hafiz denies receiving a copy of the prospectus, by signing the stock purchase agreement, she specifically acknowledged receipt of the prospectus and agreed to abide by its terms. It is well-established that a person is presumed to understand the terms of those documents that she signs. Scholtz v. Montgomery Ward & Co., 468 N.W.2d 845, 848-49 (Mich. 1991). Thus the language of the prospectus put Hafiz on notice that her employment at EDS was at-will. Cf. Rosinski v. Electronic Data Sys. Corp., No. 90-2133 (6th Cir. June 18, 1991) (WL, CTA6)

(although the stock agreement was held to be collateral to any employment contract, the agreement was held to be significant in that case because it was a major reason the employee took the job with EDS).

This claim is without merit.

IV.

Hafiz next contends that her filing of a discrimination complaint with the Michigan Department of Civil Rights resulted in a retaliatory discharge in violation of Section 701 of the Elliott-Larsen Civil Rights Act.[2] Defendant argues, and the

[2]Because the Elliott-Larsen Civil Rights Act provides similar protections as those provided in Title VII, See Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1311-12 (6th Cir. 1989), and because Michigan courts look to Title VII when resolving questions arising under the Elliott-Larsen Civil Rights Act, See id.; Sumner v. Goodyear Tire & Rubber Co., 398 M.W.2d 368, 376 (Mich. 1986), we refer, in part, to cases involving Title VII when dealing with Hafiz's claims raised under the Elliott-Larsen Civil Rights Act.

district court agreed, that Hafiz cannot present sufficient facts to support a prima facie showing of retaliatory discharge under Section 701. In addition, EDS contends, and the district court concluded, that EDS has shown valid non-discriminatory reasons for the discharge.

Section 701 prohibits discrimination or retaliation against a person "because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." Mich. Com. Laws Ann. Sec. 37.2701(a)

In a case of a retaliatory discharge claim filed under Section 701, it is proper for courts to engage in a burden-shifting type of analysis that is enunciated in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). Booker v. Brown &

Williamson Tobacco Co., 879 F.2d 1304, 1310-11 (6th Cir. 1989).

Pursuant to Burdine, an employee first must establish a prima facie case of retaliatory discharge. 450 U.S. at 252-53. If a prima facie case has been shown, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the discharge. Id. at 253. Finally, if the employer carries its burden, the employee has the burden of showing that the reason offered by the employer is merely pretext for discharging the employer for an invalid reason. Id.

This court has outlined the requirements which would satisfy a prima facie case under Section 701:

> In order to establish a prima facie case of unlawful retaliation under Elliott-Larsen, a plaintiff must establish (1) that he opposed violations of the Act or participated in activities protected by the Act, and (2) that the

> opposition or participation was a significant factor in an adverse employment decision. 'The 'significant factor' standard . . . requires a showing of more than a 'casual link.' A factor can be a 'cause' without being 'significant.' Only the latter is sufficient to show retaliatory discharge."

Booker, 879 F.2d at 1310 (citations omitted).

In addition, this Court has stated that Pretext may be established only by a "'direct showing that a discriminatory reason motivated the employer or by showing that the proffered reason is not worthy or credence.'" Id. at 1314 (citations omitted).

In this case, Hafiz engaged in protected activities on July 28, 1986 when she filed a discrimination complaint with the Michigan Department of Civil Rights. Mich. Comp. Laws Ann. Sec 37.2701(a). EDS does not dispute this fact. Nor does EDS dispute that Hafiz was discharged after she

engaged in the protected activity. EDS contends that Hafiz cannot show a significant link between the filing of the discrimination charge and her discharge.

Hafiz points to the following as evidence of the significant causal link: 1) she was given the performance improvement plan on July 31 or August 1, only a few days after she filed the discrimination charge, and was given thirty days to achieve the objectives in the performance improvement plan; and 2) "[t]he TOPS project was created specifically as a pretext in order to support EDS' decision to discharge [her]." Appellant's Br. at 36-37.

According to Hafiz, the performance improvement plan was given to her after July 28, 1986. The plan was merely a follow-up to the marginal rating she was notified of well prior to July 28. As a result, being given a performance improvement plan, in an

of itself, does not provide the appropriate nexus between the protected activity and the alleged retaliation. We find that, in this particular case, there is no evidence liking the performance improvement plan to Hafiz's filing of her complaint with the Michigan Department of Civil Rights. See Cooper v. City of North Olmsted, 795 F.2d 1265, 1272 (6th Cir. 1986) (where plaintiff received citations for performance deficiencies before and after she filed her discrimination charge with state civil rights agency, we held that plaintiff failed to establish prima facie case of retaliatory discharge--even though there was a close proximity in time between her charge filing and her discharge and even though there was an increase in post-charge deficiency citations--because there was no direct link between the citations and the filing of the charge).

As to her other claim of retaliatory action, we hold that there is also no significant link between the protected activity and the retaliatory action. While it may be possible that the TOPS project was created by EDS specifically to fail and provide EDS with a reason to discharge her, Hafiz has presented no evidence to support that allegation.

Assuming arguendo that Hafiz has established her prima facie case, EDS has presented a valid reason for discharging her, namely that she had poor performance. EDS can point to her poor performance predating her filing of the charge with the Michigan Department of Civil Rights. Furthermore, Hafiz has failed sufficiently to show that the reason given by EDS is pretextual. She makes various conclusory allegations without any evidentiary support.

This claim is without merit.

V.

Hafiz next argues that there is a genuine issue regarding whether EDS' action in terminating her employment was done, in whole or in part, because of her national origin and religion, in violation of the Section 202 of the Elliott-Larsen Civil Rights Act.

As with count II, the Burdine burden-shifting analysis applies to a discriminatory discharge claim field pursuant to Section 202. Therefore, in order for Hafiz to prevail, she must first establish a prima facie case of discrimination. Then, the employer is given an opportunity to present valid non-discriminatory reasons for her discharge. Finally, Hafiz can prevail by showing that the reasons proffered by the employer are pretextual.

Under Section 202, Hafiz can establish

a prima facie case by proving either 1) disparate treatment because of national origin or religion or 2) that the employer engaged in intentional discrimination. Singal v. General Motors Corp., 447 N.W.2d 152, 155 (Mich. App. 1989).

Under the disparate treatment prong, Hafiz must show that she was treated differently than similarly situated non-protected employees who engage in the same or similar conduct. Id. at 156; See Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992) (summary judgment is appropriate where employee fails to prove that the comparable employees are similarly situated in all respects, meaning that the comparables must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct). EDS does not dispute Hafiz's contention that she is in a protected class.

Hafiz points to several individuals she contends were similarly situated and yet were treated differently. First, she points to several employees she alleges were younger and less qualified than she, but were promoted when she was denied promotions. Hafiz gives no insight into the performance rating or objective qualifications of the alleged comparables, much less as to whether or not they performed the same job for the same supervisor. Second, Hafiz points to an employee who was treated differently while on medical leave. However, that employee was not similarly situated because that employee returned to work as soon as she was medically released while Hafiz wanted to continue on leave despite a doctor's letter advising that she was medically able to return to work. As a result, Hafiz has not provided the Court with evidence of

similarly situated individuals.

Under the intentional discrimination prong, Hafiz must show that she is a member of a protected class, that she was discharged, and that the person who discharged her was predisposed to discriminate against those in her class and had actually acted in accordance with that predisposition. Singal, 447 N.W.2d at 155-56. In this case, EDS contends and the district court concluded that the persons responsible for Hafiz's discharge were her immediate supervisor, Pak, and his manager, Miller. Hafiz has not presented any evidence which shows that either of these two had a predisposition to discriminate against those in her class and acted on that predisposition. Rather, Hafiz points to statements made by someone other than those tow individuals. Specifically, Hafiz points to a comment made by Doreen Marlow, Hafiz's

project leader for a short period of time. Marlow provided Hafiz with her work assignments and direction. Thomas Caiati, an EDS supervisor, vaguely remembers Marlow stating something to the effect that she did not like or was not getting along with Hafiz because of Hafiz's religion and/or nationality.

Notwithstanding Caiati's vague recollections regarding Marlow's statement, Marlow was not involved in the decision to discharge Hafiz. Pak testified in his deposition that he made the decision to terminate Hafiz. He further testified that he consulted McWatters and Lisette Rodriguez, an employee in the employee relations department. Because the vague comments attributed to Marlow were not made by the official responsible for terminating Hafiz, we find that, in this case, there is no nexus between the statements and the

discharge. See Wilson v. Stroh Cos., 952 F.2d 942, 945-46 (6th Cir. 1992) (summary judgment on Section 202 claim appropriate where plant manager's racial animus could not be imputed to upper-level manager who made the decision to terminate the employee); McDonald v. Union Camp Corp., 898 F. 2d 1155, 1161 (6th Cir. 1990) (nothing that the discriminatory remarks were made by an individual who was not the official responsible for terminating the plaintiff, this Court held that there simply was no nexus between the statements and the discharge).

This claim is without merit.

VI.

For the foregoing reasons, we affirm.

UNITED STATED DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMIRAT HAFIZ,

Plaintiff,

Case No: 90-CV-70198-DT
Hon. Barbara K. Hackett

vs

ELECTRONIC DATA SYSTEMS CORPORATION,

Defendant.
_____/

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant filed a motion for summary judgment on all counts of the complaint pursuant to Fed.R.Civ.P 56(c). A hearing on the motion was held on October 3, 1991.

I. FACTS

Plaintiff was employed as a systems engineer with defendant Electronic Data Systems (EDS) from January 1, 1985, until her termination on January 31, 1987. Plaintiff was "transitioned" to EDS from General Motors (GM) pursuant to the merger of those two corporations and the transfer of systems-related operations from GM to EDS.

Plaintiff began her employment with GM in 1978 as a systems analyst in data processing. Plaintiff signed an employment application and agreement dated May 30, 1978. Under the employment agreement plaintiff was employed from month-to-month on a calendar year basis (Def. motion and brief, ex. C). While employed at GM plaintiff was evaluated by her supervisors several times (Def. motion and brief. ex. E). The overall evaluations were "good - competent" or better. Some of the individual areas of evaluation ranged from "highly effective" or "superior" to "needs improvement". The evaluations also contained written comments (Def. motion and brief, ex. E). Her supervisor in 1984 before transferring to EDS was Ken McWatters.

Plaintiff "transitioned" to EDS effective January 1, 1985. No employment agreement was signed by plaintiff. GM

transitioners were not required to sign employment agreements with EDS because, with the nature of the work relationship between GM and EDS, the existing employment agreement which required confidentiality was unworkable. The agreement did state an "at will" status (Def. reply brief, ex. C, answer to interrogatory 48).

Plaintiff's first job assignment at EDS was Mesa, Arizona, working on the X car. While in Arizona she received a Stock Purchase Agreement which she signed and dated February 27, 1985, (Def. motion and brief, ex.B). She does not remember receiving a copy of the prospectus at that time. (Pl. response brief, ex. G, Hafiz affidavit). A paragraph in the prospectus states "noting herein contained...shall affect the rights of the company to terminate any participant's employment at any time for any reason." (Def. motion and brief, ex.B text para.12).

Plaintiff worked on the X car in Arizona until July 16, 1985, and then returned to Michigan. She continued to work on the project until March, 1986. Her group supervisor was Tong Pak (Def. motion and brief, ex. D, Tong Pak deposition, p.18). In March, 1986, plaintiff was called into Pak's office. Pak discussed new projects which were available but plaintiff did not feel they were acceptable. Pak suggested to plaintiff that she look for other job prospects within EDS or GM. As a result of the meeting with Pak, plaintiff requested and received an "open-door" meeting with Keith Miller, Pak's manager. It was agreed at that meeting that Miller would seek feedback from other supervisors and users on plaintiff's performance during the preceding five years. Plaintiff would supply a list of names (Def. brief and motion, ex. K).

On July 11, 1986, plaintiff and Pak met for a preliminary discussion of her annual

performance appraisal in which she was rated "marginal" and objectives from a perfcrmance improvement plan were discussed. (Def. brief and motion, exs. P,Q). The appraisal and performance improvement plan were given to her on approximately July 31, 1986. On July 28, 1991, plaintiff filed a complaint with the Michigan Department of Civil Rights. Her supervisor was notified that she filed a complaint (Four additional complaints against EDS and one against GM were subsequently filed.) She was verbally warned at work not to discuss the complaint. This warning was pursuant to company procedure (Def. brief and motion, ex. 1, affidavit of L. Rodriguez, EDS Employee Relations). This verbal warning was followed up by a telephone call to plaintiff's home and a letter from Pak dated September 24, 1986 (Pl. response, ex. F; ex.L. Hafiz dep. v.2,p.60). After a vacation and attendance at a training

session in August, plaintiff requested and received starting in late August, 1986, medical leave for a stress related disability.

In approximately late November plaintiff was notified, according to EDS practices for stress related disability, to report to an EDS doctor for evaluation regarding her ability to return to work (Def. brief and motion, ex. 1, affidavit of L. Rodriguez, EDS Employee Relations). Plaintiff had not previously supplied a return date to EDS. Plaintiff was evaluated as able to return to work. Once an employee is evaluated as able to return to work, he or she is no longer eligible for medical leave (Def. brief and motion, ex. 1, affidavit of L. Rodriguez, EDS Employee Relations). An employee can take uncompensated personal leave when no longer eligible for medical leave. Plaintiff was notified that her medical leave would be

terminated as of December 5, 1986.

Plaintiff returned to her place of employment on December 5, 1986, and met with Pak and Ken McWatters who had replaced Keith Miller as manager sometime in September, 1986. She was notified that unpaid personal leave of absence was available. Her official return to work date was December 19, 1986. At that time she again met with Pak and McWatters. She was informed that she was still under the performance improvement plan of July, 1986. She was also informed that she was required to provide a doctor's excuse for any sick day taken. She was assigned to TOPS project (Pl. response, ex. L. Hafiz dep. v.2, p. 106-107). Plaintiff requested vacation but, after a call made by McWatters, her request was denied (Pl. response, ex. L, Hafiz dep. v.2, p. 112).

Plaintiff worked on the TOPS project from December 19, 1986, until her

termination. There were some problems with the project, partially because of computer routines supplied to plaintiff which did not work. There seems to have been some disagreement between plaintiff and Pak regarding approaches for remedying the systems' problems. On January 31, 1987, plaintiff was notified of her termination because she had not made progress on the performance improvement plan (Pl. response, ex. L. McWatters dep., p.55-56).

Plaintiff originally filed a complaint in Wayne County Circuit Court on July 11, 1989. Defendant removed the case to this court on the basis of diversity of citizenship. A second amended complaint was filed May 21, 1990 stated the following counts:

Count I: Wrongful termination contrary to the policies, practices, and procedures of EDS which implied "just cause" rather than "at will" employment;

Count II: Retaliatory discharge (Elliott-Larsen Sec 701) for filing a complaint with the Michigan Department of Civil Rights;

Count III: Unlawful discharge based on discrimination because of religion and national origin (Elliott-Larsen Section 202).

II. DISCUSSION

A. Standard for summary judgment

Federal Rule of Civil Procedure 56(c) provides that a moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A party may not defeat a motion for summary judgment simply by asserting that facts are in dispute. Street v J. C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989). When the moving party established by use of the material specified in Rule 56(c) that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law, the opposing party assumes

the burden to come forward with "specific facts showing that there is a genuine issue for trial." First National Bank of Arizona v Cities Services Co., 391 U.S. 253, 270 88 S.Ct. 1575, 1583, 20 L.Ed.2d 569 (1968). Mere allegations or denials in the non-movant's pleadings will not meet this burden. Anderson v Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

All facts and inferences must be viewed in the light most favorable to the non-moving party. However, the non-moving party may not rest upon its pleadings and must, in some way, show specific facts pointing to an issue for trial. Coletex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

B. Wrongful discharge

Plaintiff argues that there is sufficient evidence to support her claim that the polices, practices, or

representations at GM and EDS imply "just cause" employment. Plaintiff allegedly was told by GM personnel office representative that GM was a good place to work and job security was good. She claims she turned down other job offers because of the job security representations. Additionally, plaintiff refers to statements in the GM handbook that discharge or discipline can only be for a reason. Another argument asserted is that there is no indication in written documents or records that EDS preserved the right to fire at will. Plaintiff further claims that EDS and GM said all GM policies apply to those employees moved to EDS. Thus, she argues, the practices at EDS and GM is clearly "for cause."

Plaintiff argues that under Michigan case law these types of factual items create an issue for the jury. Toussaint v. Blue Cross Blue Shield of Michigan, 408 Mich 579

(1980); King v. Mich Con, 177 Mich App. 531 (1989); Farrell v. Auto Club of Michigan, 155 Mich App. 378 (1986); Crowdrey v. A & T Transport, 141 Mich. App. 617 (1985); Struble v. Lax Industries, Inc., 157 Mich. App. 169 (1986); Schipani v. Ford Motor Co., 102 Mich App. 606 (981).

Plaintiff further argues that under Langland v. Bronson Methodist Hospital, 178 Mich. App. 612, 616-17 (1989) a jury question exists when stated termination policies contain expressions of both "at will" and "just cause" employment. See also, Renny v. Port Huron Hospital, 427 Mich. 415, 417 (1987); Dolton v. Herbruck Egg Sales Corp., 164 Mich. App. 543, 547 (1987).

Plaintiff claims defendant's reliance on Singal v. General Motors Corp., 179 Mich App 497, 502, 447 N.W.2d 152 (1989) and Taylor v. General Motors Corp., 826 F.2d 452 (6th Cir. 1987) as supporting an

interpretation that the GM month-to-month agreement is an "at will" agreement is misplaced. The cases only say that GM is a month-to-month employer which at best creates an indefinite period of employment.

On the wrongful termination count defendant relies on Toussaint and numerous cases interpreting it. Rowe v. Montgomery Ward, ___ Mich. ___, 1991 WL 168774 (Docket No. 84848, July 31, 1991); Valentine v. General American Credit, Inc., 420 Mich 256, 362 N.W.2d 469 (1986); Clifford v. Cactus Drilling Corp. 419 Mich 356, 353 N.W. 2d 469 (1984); Vollrath v. Georgia-Pacific Corp., 899 F.2d 533, 535 (6th Cir. 1990); Elsey v. Burger King, 917 F.2d 256, 260 (6th Cir. 1990); Pratt v. Brown Machine Co., 855 F.2d 1225, 1234 (6th Cir. 1988); Boyton v. TRW, Inc., 858 F.2d 1178, 1185 (6th Cir. 1988) (en banc). Defendant argues that plaintiff was an at-will employee as presumed under Michigan law and she cannot present

sufficient evidence to support her claim that at-will status was modified by policy, practices, and representations of EDS. Defendant cites to Michigan case law supporting its argument that optimistic statements of a bright future are insufficient to establish a just cause employment contract. Schwartz v. Michigan Sugar Co., 106 Mich App. 471, 308 N.W.2d 459 (1981); Dzierwa v. Michigan Oil Co., 152 Mich App. 274, 393 N.W.2d 610 (1988); Grow v. General Products, Inc., 184 Mich. App. 379, 457 N.W.2d 167, 169 (1990). In support of its argument that employment at EDS was at-will defendant furnished an affidavit of Cathy Grube, Employee Relations Manager at EDS, in which she states that EDS has had an at-will practice through written employment agreements for over fifteen years (Def. reply brief, ex. B).

Defendant further argues that its conclusion that plaintiff had an at-will

status is bolstered by the at-will status she had at GM prior to transferring to EDS. Defendant supports its claim that the GM employment agreement for month-to-month employment was an "at-will" agreement by citing Michigan and federal case law. Singal v. General Motors, 179 Mich. App. 497, 447 N.W.2d 152 (1989); Taylor v. General Motors Corp., 826 F.2d 452 (6th Cir. 1987).

Additionally defendant argues that language in a stock prospectus for participation in EDS's Stock Incentive Plan was clear and equivocal notice that employment at EDS was at-will. The information on the Stock Incentive Plan allegedly included both a prospectus and a Restricted Stock Agreement. Defendant states that the Sixth Circuit in an unpublished opinion affirmed Judge Zatkoff's conclusion that the prospectus language was notice of at-will employment. Rosinkski v.

Electronic Data Systems, 935 F.2d 270 (6th Cir. 1991) (unpublished opinion). Defendant cites Duncan v. Rolm Mil-Spec Computers, 917 F.2d 261 (6th Cir. 1990) for the argument that oral assurances given the plaintiff-employee by the employee's supervisor are negated by the signing of an employment agreement which acknowledged an at-will status. Defendant contends that plaintiff got the prospectus at the same time she signed the Restricted Stock Agreement.

Defendant argues that since plaintiff cites only general statements and her own subjective expectation of job security based on those general representations, plaintiff cannot support a general issue of material fact on a Toussaint claim. As such defendant asserts that it is entitled to a judgment as a matter of law.

Michigan law provides that relations between employers and their employees are generally "terminable at the will of either

party." Lynas v. Maxwell Farms, 279 Mich. 684, 273 N.W. 315 (1937). In Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 589, 292 N.W.2d 880 (1980) the Michigan Supreme Court recognized the concept of an implied "just cause" limitation on discharge. Toussaint indicated that a "just cause" limitation on discharge could be implied "either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements." Id. at 598, 292 N.W.2d 880.

The oral promise and policy manual prongs of Toussaint were compared and contrasted in two 1989 Michigan Supreme Court opinions. In Bullock v. Automobile Club of Michigan, 432 Mich. 472, 444 N.W.2d 114 (1989), the court confirmed the reasoning of Toussaint that an employer's oral promises give rise to enforceable

contract rights. Id. at 482-83, 444 N.W.2d 114. In In re Certified Question (Bankey v. Storer Broadcasting Co.), 432 Mich. 438, 453-54, 443 N.W.2d 112 (1989) the court expressly rejected a contractual approach to the policy manual prong. The policy manual terms are "enforceable not as express promises, in quasi contract, or because of promissory estoppel but because the Court under its common-law authority recognizes the enforceability of a 'a situation instinct "instinct with an obligation," ' an obligation distinct from an independent contract analysis." Bullock, supra at 480, 444 N.W.2d 114 (explaining Toussaint). Both of these cases dealt with the employer's right to amend employment policies.

Recently the Michigan Supreme Court has refined the limits of Toussaint. In Rowe v. Montgomery Ward, supra the court addressed the question of whether an employer's oral statements and written policy statements

created an employment contract terminable only for cause. Id. at *1. In Rowe plaintiff was hired as a salesperson and was told she'd have her job as long as she generated sales and was honest. At the time of her hire she signed a "rules" sheet which listed activities which would result in immediate dismissal. Subsequently defendant issued three employee handbooks which stated an "at-will" policy. Id. at *1-2. Plaintiff was terminated after taking an unauthorized one-day absence.

The Michigan Supreme Court sought a resolution consistent with contract law relative to the employment setting. Id. at *1. The court looked to all the facts and circumstances to determine the intent of the parties. "In deciding whether there was mutual assent to a just-cause provision, we use an objective test, 'looking to the expressed words of the parties and their visible acts.'" Id. at *4 (citations

omitted.) The court stated that the starting point in analyzing oral statements for contractual implications is to determine the meaning that reasonable persons might have attached to the language, given the circumstances presented. Id. The court agreed with the federal court in Carpenter v. American Excelsior Co., 650 F.Supp. 933, 936, n. 6 (E.D.Mich 1987), that any orally grounded contractual obligation for permanent employment must be based on more than an optimistic hope of a long relationship.

The court found that the surrounding circumstances in Toussiant and Rowe differed. There were no pre-employment negotiations in Rowe. The fact that plaintiff applied for one of several identical positions goes against the likelihood that the contract was negotiable and suggests that company policy was more likely to govern. Id. at *6. There was no

objective support in the employee manual which supported the oral representations. Additionally, the sign-off sheet in the handbooks conflicts with a "just-cause" interpretation. The court concluded that oral statements of job security must be clear and unequivocal to overcome the presumption of employment at will. Id. Statements couched in general terms are more akin to stating a policy than offering an expressed contract. Id. at *7.

On the second issue of whether the disciplinary guidelines issued by defendant gave rise to an employment contract providing for only "just cause" termination where the defendant also issued a sign-off sheet stating an at will policy, the court found that the sign-off sheet stating an at will policy, the court found that the sign-off sheet provided an unequivocal notification of at will employment . Under Certified Question, supra the sign-off sheet

unilaterally modified any prior expectations of termination only for cause. Id. at *8. The court rejected plaintiff's claim of lack of notice of the act will policy since she had the handbooks well in advance of her termination. The fact that plaintiff did not sign the sign-off sheet was not dispositive because he assent to the policy would only be necessary if there were a prior express contract of termination only for cause. Here there was no such agreement. Id. at *9.

A footnote to Justice Boyle's concurring opinion lists factors to be considered:

> Among the circumstances identified as objective indications of intent are the clarity, specificity, and lack of ambiguity of oral statements; whether there were specific negotiations for job security; the nature of the position; and whether, if policy statements are relied on, they support or undercut a reasonable belief that a promise of job security was being extended.

Id. at *36, n. 4.

The Sixth Circuit has addressed Toussaint claims on several occasions, all prior to the Rowe decision. In McDonald v. Union Camp Corp., 898 F.2d 1155 (6th Cir. 1990) the court dealt with a situation where there was no written employment contract. It held that McDonald had presented evidence of job security made by upper level management, statements that if he did a good job, he could expect promotional opportunities, and evidence of awards, salary increases, and bonuses based on favorable evaluations. That evidence created an inference that McDonald had a contract implied in fact. The court ruled that plaintiff had failed to present sufficient evidence to submit the issue of whether there had been just cause for firing him to the jury. Id. at 1163-64.

Other Sixth Circuit cases dealt with specific statements of "at-will" employment made in policy manuals or in employment

agreements or applications. Elsey v. Burger King Corp., 917 F.2d 256 (6th Cir. 1990) (no conflicting policy manual statements of at will status and "just cause" limitations because the policy manual unequivocally established at will employment); Duncan v. Rolm Mil-Spec Computers, 917 F.2d 261 (6th Cir. 1990) (certain written statement, oral representations, and a "get well" program to help employee performance expressed only an optimistic hope of a long-standing employment relationship and "get well" program was not inconsistent with at will employment). See also, Vollrath v. Georgia-Pacific Corp., 899 F.2d 533 (6th Cir. 1990) (policy explicitly set forth in policy manual not modified by formal or informal actions of the company); Reid v. Sears Roebuck and Co., 790 F.2d 452 (6th Cir. 1986) (at will policy established in employment applications not modified into "just cause" contract by statements in

employee handbook); Pratt v. Brown Machine Co., 855 F.2d 1225 (6th Cir. 1988) (statements in the company handbook outlining the "acts" which could result in termination and assurances made at the tear-out page in the employee handbook.)

In applying the case law to the present case, it is clear that plaintiff cannot present sufficient evidence to support a claim of "just cause " employment. Using the factors enunciated in Justice Boyle's concurrence in Rowe, there are no objective indications of intent on the part of EDS to provide just cause employment. Any oral statements made by Gm or EDS officials would have to be viewed as expressions of optimistic hope of a long-term relationship. EDS intended employment to be at will. That had been its policy in the past. Mutual assent on employment with termination only for just cause was clearly Iacking.

Additionally, there were no specific

negotiations for job security. The position plaintiff held was one of many systems engineers. The policy statements made to transitioning GM employees and booklets provided would not support a reasonable belief that a promise of job security was being extended. The written statements and talks to transferring employees were general in nature. This is not inconsistent with earlier Sixth Circuit opinions.

The recent unpublished opinion by the Sixth Circuit, Rosinski v. Electronic Data Systems, 935 F.2d 270 (6th Cir. 1991) (text in Westlaw) is not relied on by this court. It does have numerous factual similarities to the present case, but Rosinski is distinguishable in that Hafiz did not rely on the stock purchase plan in her decision to transfer to EDS. Thus the stock purchase agreement was clearly collateral to her employment decision and cannot be considered adequate notice of a policy of termination

at will. However, as the Rosinski court stated, the oral assurances and policy statements would be insufficient to establish either an expressed agreement or a legitimate expectation that employment was terminable only for just cause.

Based on the foregoing discussion it is clear that plaintiff's claim that she had just cause employment is without merit and defendant is entitled to summary judgment on count I of plaintiff's complaint.

C. Retaliatory discharge

Plaintiff argues that there are facts to support a prima facie case that her filing of the discrimination claim resulted in retaliatory discharge. Plaintiff allegedly was given clerical work and passed over for promotion in 1986. The day she was put on the improvement plan, July 28, 1986, she filed the first discrimination claim. Shortly thereafter she went on sick leave. Plaintiff alleges that she was told that if

she discussed her changes she would be fired. Furthermore she received a letter from Tong Pak reiterating what she was told earlier about discussing her claim. On her return from sick leave in December, 1986, she was given a job for which she had no expertise. She worked on that new job but was discharged for a "bad attitude". Plaintiff contends that someone who filed a discrimination claim would also be called an employee with a "bad attitude". The improvement plan was supposed to last ninety days yet plaintiff was discharged five or six weeks following her return to work.

Defendant argues that plaintiff cannot present a prima facie case of retaliatory discharge under Elliott-Larsen. Defendant refers to the requirements listed in Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1310 (6th Cir. 1989) and Polk v. Yellow Freight Systems, 801 F.2d 190, 199 (6th Cir. 1986).

Defendant argues that plaintiff cannot meet the "significant factor" standard in Booker. Defendant contends that plaintiff relies on mere allegations that her termination was based on her supervisor's knowledge that she filed a civil rights claim. Defendant alleges that EDS was on record as to plaintiff's poor performance long before plaintiff filed her first civil rights claim. Also plaintiff's discharge occurred six (6) months after the filing of her first charge. This coupled with the prior documentations of performance problems, according to defendant, weighs heavily against a finding that discrimination was a significant factor in plaintiff's discharge.

Under Michigan law, in a case of retaliatory discharge, as in other protected activity cases, the proper analysis is that enunciated in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 101

S. Ct. 1089, 1093, 67 L.Ed.2d 207 (1981). The Burdine analysis is a shifting type of analysis. The plaintiff has the initial burden of presenting a prima facie case of discriminatory discharge. The employer can then rebut by showing that there were valid non-discriminatory reasons for the discharge. In order to defeat the employer's valid non-discriminatory reasons, plaintiff must show that it was pretextual. Taylor v. General Motors Corp., 826 F.2d 452, 456 (6th Cir. 1987). The ultimate burden of proof rests with the plaintiff at all times. Burdine, supra at 253, 101 S.Ct. at 1093-95. See also, Polk v. Yellow Freight System, Inc., supra; McDonnell Douglas Corp. v. Green, 441 U.S. 792, 99 S.Ct. 2400, 60 L.Ed.2d 646 (1973).

In order to establish a prima facie case for retaliatory discharge under Elliott-Larsen, a plaintiff must establish 1) that he/she opposed violations of the Act

or participated in activities protected by the Act, and 2) that the opposition or participation was a significant factor in an adverse employment decision. Booker v. Brown Williamson Tobacco Co., Inc., 879 F.2d 1304, 1310 (6th Cir. 1989). There must be more than a "causal link." The opposition or participation must be a significant factor in the adverse employment decision. Id. at 1330. (citing Polk, supra at 199).

Just as in Booker plaintiff in the present case has merely made allegations that her discharge occurred in retaliation for her filing the discrimination claims and that her supervisors knew about the claims. These types of allegations are insufficient to establish a prima facie case. "An employee may not invoke protection of the Act by making a vague charge of discrimination." Id. at 1313. Assuming arguendo that plaintiff had made a prima facie case, defendant had articulated a

legitimate nondiscriminatory reason. Plaintiff's performance was poor and had been documented as such long before she filed her first claim. Plaintiff attempts to present a pretext by alleging that she was fired for having a "bad attitude" and that people who filed civil rights claims were also considered as having a "bad attitude." Once again this is nothing more than conclusory allegations. This is patently not enough to get to the jury. Accordingly, defendant's motion for summary judgment on count II will be granted.

D. **Discrimination of the basis of national origin and religion**

Plaintiff argues that she can present a prima facie case under the standards of McDonald Douglas v. Green. 411 U.S. 792 (1972) which require a showing (1) that plaintiff was a member of a protected class, (2) that some negative employment actions was taken against her, and (3) that she had

been doing her job adequately. The only dispute is whether or not plaintiff was doing her job adequately. She contends she was. Plaintiff was the only Moslem and Arab in her unit, giving rise to an inference of discrimination.

Plaintiff contends that defendant's non-discriminatory reason for the discharge -- plaintiff was not doing an adequate job -- cannot be shown. The prior evaluations were clearly contradictory to the appraisals accumulated by her manager. Plaintiff argues that this contradictory evidence shows that the defendant's nondiscriminatory reason was mere pretext for the subjective reason that the defendant did not want an Arab Moslem working for it. See Abrams v. Johnson, 534 F.2d 1226 (6th Cir. 1976). Plaintiff claims she can show "comparables" and that there is evidence that plaintiff received disparate treatment regarding required medical reports, denial of

vacation, and putting only minorities on the improvement plan.

Defendant contends that plaintiff cannot establish a prima facie case that her religion or national origin were factors in the decision to terminate her employment. Under Elliott-Larsen plaintiff must prove either (1) that she was accorded disparate treatment because of her national origin or religion or (2) that her employer engaged in intentional discrimination. Marsh v. Department of Civil Services, 173 Mich. App. 72, 433 N.W.2d 820, 823 (1988); Wyatt v. Southland Corp., 162 Mich App. 372, 374-75 (1987). Defendant contends that plaintiff cannot present a prima facie case of either intentional discrimination or disparate treatment.

A prima facie case of intentional discrimination is established by showing (1) that plaintiff was a member of a protected class, (2) that plaintiff was discharged,

(3) that the person discharging plaintiff was predisposed to discriminated against those in the protected class, (4) that the person discharging plaintiff acted on the predisposition in discharging plaintiff. Plaintiff can show that her managers knew she was Egyptian (Pak dep.,p.42; McWatters dep., p. 58). Defendant argues that plaintiff cannot show that her managers knew her religion or were predisposed to discriminate against Moslems or Egyptians. Plaintiff admits that she can't remember if anyone called her any derogatory names or referred to her national origin or religion in a negative way while at EDS (Hafiz dep. v.2,p. 191-92). Even if there were isolated referenced by co-workers to plaintiff's national origin or religion, as claimed by plaintiff (Hafiz dep. v.2, p. 74-75,80), these referenced are insufficient to support a predisposition of discrimination. McDonald v. Union Camp Corp., 49 Empl. Prac.

Dec. (CCH) 38,884 (W.D. Mich. 1989), aff'd 898 F.2d 1155 (6th Cir. 1990). Defendant contends there is no evidence of discriminatory predisposition.

Defendant claims plaintiff fares no better under "disparate treatment" because she cannot show "comparables" who are similarly situated in all respects. Stotts v. Memphis Fire Department, 858 F.2d 289 (6th Cir. 1988); Mazzella v. RCA Global Communications, 642 F.Supp. 1531 (S.D.N.Y. 1986). Lanear v. Safeway Grocery, 843 F.2d 298 (8th Cir. 1988). Defendant argues that plaintiff cannot show "comparables' regarding placement or poor performers on improvement plans. Nor can she show similarly situated persons in relation to the requirement she be evaluated by an EDS doctor to determine her medical status for the continuation of her medical leave. In summary defendant contends that all plaintiff has are conclusory allegations of

discriminatorv animus which are insufficient to establish a prima facie case. Clark v. Uniroyal, 119 Mich. App. 820, 285-26, 327 N.W.Ed 372 (1982).

As with count II above, the Burdine shifting burden analysis applies to disciminatory discharge. Under Elliott-Larsen plaintiff here can establish a prima facie case by providing either 1) desperate treatment because of national origin or religion or 2) that the employer engaged in intentional discrimination. Singal v. General Motors Corp., 179 Mich App 497, 502, 447 N.W.2d 152 (1989). Under the disparate treatment prong, plaintiff must show that she was member of a class protected by the Act and that she was treated differently than persons of a different class for the same or similar conduct. Id. at 504. Under the intentional discrimination prong, plaintiff must show that she is a member of a protected class, that she was discharged,

and that the person who discharged her was predisposed to discriminate against those in her class and had actually acted with that predisposition. Id.

In disposition testimony Pak, Miller and McWatters testified that they did not know her religion. They did know her national origin was Egyptian. To establish a prima facie case under the disparate treatment prong, plaintiff states in her deposition that others were treated differently regarding a performance appraisal rating of marginal, being put on a performance improvement plan, and regarding medical evaluations, sick leave and vacation policy. Defendant rebuts via deposition testimony from McWatters (marginal evaluation and performance plan) and an affidavit from Rodriguez (medical evaluation, sick leave and vacation policy). Plaintiff's attempt at proving the non-discriminatory reasons were pretext is a

statement that she was the only Moslem - Egyptian in the department and this creates an inference of discrimination.

On the intentional discrimination prong, plaintiff cannot show any predisposition against Egyptians or Moslem other than relying on a statement in the EDS employee handbook about the rescue of EDS employees held captive in Iran. To plaintiff this indicates a predisposition of discrimination against Egyptians or Arabs. To establish a prima facie case the plaintiff must show the person responsible for her discharge had a predisposition and acted upon it. The persons responsible would be her immediate supervisor Pak and his manager Miller who was replaced by McWatters. She cannot show that either of these persons had a predisposition or acted on it. Statements made concerning her national origin were made by people other than her supervisor. In her deposition she

states that Pak had not made any such remarks to her or about her. Even if plaintiff would be considered as having made out a prima facie case, she cannot rebut defendant's legitimate non-discriminatory reason for discharge as being pretextual. Thus, defendant is entitled to summary judgment on count III.

III. CONCLUSION

For the reasons stated above,

IT IS ORDERED that defendant's motion for summary judgment is hereby GRANTED. Accordingly,

IT IS FURTHER ORDERED that plaintiff's complaint hereby is DISMISSED in its entirety with prejudice.

s/ Barbara K. Hackett

BARBARA K. HACKETT
United States District Judge

DATED: October 17, 1991

Case Nos. 91-23111, 92-2293

Filed oct 1, 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

SAMIRAT HAFIZ
Plaintiff - Appellant

v.

ELECTRONIC DATA SYSTEMS CORPORATION
Defendant - Appellee

BEFORE: JONES and BATCHELDER, Cir. Jdg;
CELEBREZZE, Senior Circuit Judge

Upon consideration of the petition for rehearing filed by the appellant,

IT IS **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

s/ Leonard Green

Leonard Green, Clerk

APPENDIX C

UNITED STATED DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMIRAT HAFIZ,

Plaintiff,

Case No: 90-CV-70198-DT
Hon. Barbara K. Hackett

vs

ELECTRONIC DATA SYSTEMS CORPORATION,

Defendant.

_____/

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT AND MOTION FOR **RECONSIDERATION**

On November 19, 1991, plaintiff filed in pro per a motion for relief from judgment pursuant to Fed.R.Civ.p. 60(b), and a motion for reconsideration. Plaintiff seeks relief and/or reconsideration of the order granting defendant's motion for summary judgment and the judgment entered October 17, 19991.

Prior to the filing in pro per of plaintiff's motions, plaintiff's previous attorney filed a notice of appeal on November 12, 1991. The record was forwarded to the Sixth Circuit Court of Appeals on November 14, 1991.

Under 28 U.S.C. Sec. 1291, "the courts

of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ." Rule 4 of the Federal Rules of Appellate Procedure states that notice of appeal on a civil case from a district court to a court of appeals must be filed within thirty (30) days after the date of the entry of judgment.

A timely notice of appeal was filed prior to the filing of plaintiff's motions for relief from judgment and reconsideration. Jurisdiction now rests with the Court of Appeals for the Sixth Circuit. Accordingly,

IT IS ORDERED that plaintiff's motion for relief from judgment and motion for reconsideration are DENIED because of lack of jurisdiction over the case.

s/ Barbara K. Hackett

BARBARA K. HACKETT
United States District Judge

DATED: November 27, 1991

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MICHIGAN EMPLOYMENT SECURITY COMMISSION

REFEREE DIVISION

IN THE MATTER OF THE CLAIM OF

SAMIRAT HAFIZ
900 DEVONSHIRE BLVD.
BRIGHTON, MI 48116

EMPLOYER INVOLVED

ELECTRONIC DATE SYSTEMS CORPORATION
26533 Evergreen-P.O. Box 5121
SOUTHFIELD, MI 48086

S.S. No. 386-52 1127 Appeal No. 887 04483

REFEREE: MELVYN G. GVAZDA

FINDINGS OF FACT AND REASONS

The claimant timely appealed from a Commission redetermination holding her disqualified for benefits in accord with the provisions of Section 29(1)(b) of the Act for week ending January 31, 1987. In addition, restitution was ordered of $229.00 in benefits previously received pursuant to the provisions of Section 62(a) of the Act.

The matter was scheduled for hearing before the Undersigned Referee at Ypsilanti, Michigan, June 23, 1987, at which time the

following persons appeared:

Samirat Hafiz, Claimant

Mark Berkley, Attorney for Claimant

There was no appearance for or on behalf of the involved employer and no request for adjournment by the employer. Notices of hearing were mailed to the respective parties June 2, 1987 and that notice mailed to the employer was not returned as undelivered or undeliverable by the postal authorities. It presumably was received and the failure of the employer to appear at the hearing is considered to be on a basis that is voluntary and with notice of the hearing.

The record established the following Material Facts:

The claimant worked for the involved employer and/or its predecessor from May 30, 1978 through January 30, 1987. She was

employed as a Systems Analyst. Her job was involved with analysis and design programming. She was a full-time employee working 40 hours a week and in a salaried position.

MATERIAL FACTS

The claimant became separated from employment by means of dismissal for reasons which were not detailed to her and which were unexplained to her.

The employer contended in hearsay information submitted to the Commission that the claimant's dismissal was generally for her being uncooperative, unproductive, insubordinate and unwilling to make things work. The claimant denies the general scattered allegations of the employer. She denied any warnings from the employer that her performance, demeanor or behavior was in any way unsatisfactory.

The claimant has filed a discrimination claim concerning her conditions and contends, without direct evidence in support thereof, that her dismissal was retaliatory for said claim.

REASONS FOR DECISION

Section 29(1)(b) of the Act reads as follows:

> "Sec. 29 (1) An individual shall be disqualified for benefits in the following cases in which the individual:
>
> "(b) Was discharged for misconduct connected with the individual's work, or for intoxication while at work unless the discharge was subsequently reduced to a disciplinary layoff or suspension."

The burden of proof is upon the employer to demonstrate a dismissal for reasons of

misconduct. That means that the employer must appear at the hearing and offer such legally admissible and credible evidence into the record as is competent in support of its contention, and outweighs any offered in opposition to it.

In the instant matter, the employer failed to appear at the hearing or offer any evidence into the record. The record contains only those allegations and hearsay information from the employer and a denial under oath of any wrongdoing by the claimant. Given the state of the record, we cannot conclude that the employer has satisfied its burden under the law and demonstrated, by means of legally competent admissible evidence into the record, that the dismissal was for any reason rising to the level of misconduct which would be disqualifying.

DECISION

The redetermination issued by the Commission is reversed.

Claimant is not disqualified for benefits in accord with the provisions of Section 29 (1)(b) of the Act, relative to separation from employment with the involved employer. She is deemed to have been separated under non-disqualifying circumstances. She may be eligible for benefits, provided otherwise eligible or qualified.

s/ Melvyn O. Gvazda

Melvyn O. Gvazda, Referee

June 29, 1987

Mailed at Detroit, MI 48202